In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **SANDI DAWN NIEVES,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S092410

Los Angeles County Superior Court Case No. PA030589-01
The Honorable L. Jeffrey Wiatt, Judge

RESPONDENT'S BRIEF
(Volume 1 of 2)

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STATEMENT OF THE CASE

In an information filed June 16, 1999, by the District Attorney of Los Angeles County, appellant was charged with four counts of murder, in violation of Penal Code section 187, subdivision (a) (counts 1-4).[1] It was further alleged that appellant committed the murders while engaged in the crime of arson, within the meaning of section 190.2, subdivision (a)(17). It was additionally alleged that appellant intentionally killed the victims while lying in wait, within the meaning of section 190.2, subdivision (a)(15), and that appellant committed multiple murder, within the meaning of section 190.2, subdivision (a)(3). Appellant was additionally charged with one count of attempted willful, deliberate, premeditated murder, in violation of sections 664/187, subdivision (a)(1) (count 5). Finally, appellant was charged with arson causing great bodily injury, in violation of section 451, subdivision (a) (count 6). The information also included an informal request that defense counsel provide discovery to the People, pursuant to section 1054.3. (9RCT 2014-2018.)[2]

Appellant pled not guilty and denied all special allegations. (9RCT 2019.) In a memorandum filed August 16, 1999, the prosecution stated its intention to seek the death penalty. (10RCT 2087; see 3RT 114.)

Jury selection commenced. On April 24, 2000, the trial court received requests for hardship disqualification. (11RCT 2603-2654; see also 11RT 605-606, 632-667, 676-685.) On May 2, 2000, a panel of 12 jurors and 4

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[1] All future statutory references are to the Penal Code, unless otherwise indicated.

[2] There are two sets of Clerk's Transcripts volumes 1 through 24. The first set is dated February 13, 2001. The second set is dated October 13, 2006. The two sets are not identical. Appellant's opening brief refers exclusively to the second set as "RCT." To avoid confusion, respondent does likewise. The first set will be referred to as "CT."

alternate jurors was sworn to try the cause. (18RCT 4392; 13RT 1104, 1225.)

On May 3, 2000, the case was called for pretrial motions. (18RCT 4397; see, e.g., 14RT 1236-1238, 1242 [ruling on David Nieves as possible third-party culpability evidence was resolved in defense's favor]; 1263-1266, 1270 [trial court rules that defense counsel cannot refer in opening statement to appellant's statement to the police, but can refer to expert who relied on appellant's statement]; 1296, 1299-1300 [trial court ruled that it would allow defense counsel to refer to the A&E taped comments of Detective Perales in opening statements].) The prosecution announced an additional witness, who took footprints from appellant. Defense counsel stated he was not previously aware of this witness and had not had an opportunity to talk to the witness. (14RT 1277-1278.) The trial court warned counsel that "speaking objections" would not be "allowed or tolerated." (14RT 1283.)

On May 8, 2000, out of the presence of the jury, the court granted the defense motion to exclude witnesses with the exception of the two investigating officers, the fathers of the victims, and the stepmother. The prosecution and the defense made opening statements. (18RCT 4416; see also 15RT 1316-1317, 1377-1378 [court notes defense opening statement has taken an hour, and defense wants two more hours; trial court also notes that much of opening statement has been argumentative, but there have been no objections]; 1419 [court warns defense counsel that his opening statement is "way over the line as far as argument"]; 1449 [trial court again warns defense counsel].)

On May 9, 2000, trial resumed with defense counsel continuing his opening statement. Outside the presence of the jury, court and counsel conferred regarding the prosecution's request for further discovery.

(18RCT 4433; see 16RT 1469 [trial court allows defense to continue opening statement].)

On May 16, 2000, court and counsel conferred regarding scheduling of witnesses. Eight witnesses were called to testify for the prosecution. (18RCT 4446.) Clare Cserney testified for the defense, taken out of order for the convenience of the witness. (18RCT 4447.)

Over defense objection, an amended information was filed by the District Attorney of Los Angeles County on May 30, 2000. The only change was to the arson count (count 6): the prosecution amended section 451 by deleting subdivision (a) and inserting subdivision (b), so that the count became arson of an inhabited structure, instead of arson causing great bodily injury. (18RCT 4493-4494.) The information again included an informal request that defense counsel provide discovery to the prosecution, pursuant to section 1054.3. (18RCT 4492.) The prosecution called its final witness for its case-in-chief, and then rested. The defense motion pursuant to section 1118.1 was argued and denied. Defense witnesses began testifying. (18RCT 4494.)

Following rebuttal, surrebuttal, and sur-surrebuttal, plus a two-week recess, the jury received guilt phase instructions on July 19, 2000. (20RCT 4967-5004, 5065-5066.)

On July 27, 2000, the jury found appellant guilty of four counts of first degree murder, and found "true" as to each count that at the time of the commission of each murder she was engaged in the commission of the crime of arson and that she intentionally killed the victims while lying in wait. (20RCT 5138-5141.) Additionally, the jury found appellant guilty of attempted murder, and found "true" the allegation that the attempted murder was committed willfully, deliberately, and with premeditation. (20RCT 5142.) The jury also convicted appellant of the crime of arson.

(20RCT 5143.) Finally, the jury found "true" the allegation that appellant was convicted of multiple murders. (20RCT 5144.)

On July 28, 2000, there was a hearing regarding defense counsel's failure to comply with the rules of discovery. The trial court announced that it did not intend to impose sanctions. (20RCT 5254-5255.) Defense counsel turned over additional discovery material. (20RCT 5255.)

On August 1, 2000, the People and defense counsel gave opening statements in the penalty phase. (21RCT 5269.)

On August 2, 2000, defense counsel's motion for mistrial was denied. (21RCT 5274.) A contempt hearing regarding defense counsel's disobeying a court order by making comments in front of the jury was set for August 4, 2000. The People rested and the defense penalty phase began. (21RCT 5275.)

On August 4, 2000, the defense filed an affidavit of disqualification. (21RCT 5280.) Defense counsel's contempt hearing was continued to August 18, 2000. (21RCT 5359.) The defense rested and the prosecution's rebuttal case began. Defense counsel was admonished that he might be cited for misconduct. The defense offered surrebuttal, out of order. (21RCT 5360.)

On August 7, 2000, county counsel, representing the trial judge, filed a memorandum of points and authorities and verified answer to statements of disqualification. (21RCT 5365.) That day, the prosecution and the defense gave closing arguments. (21RCT 5374.)

The jury received penalty phase instructions on August 9, 2000. (21RCT 5403-5419.) That same day, the jury returned a verdict of death. (21RCT 5420.)

On October 5, 2000, appellant filed a motion for new trial. The motion alleged judicial misconduct and bias. (22RCT 5535-5596.)

On October 6, 2000, the trial court signed a commitment and judgment of death. (22RCT 5616, 5627-5629.) Appellant's motion for new trial was argued and denied. An automatic motion to modify the verdict was heard and denied. (22RCT 5630-5639.)

This appeal is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

A. Guilt Phase

1. Appellant's relationship with the Volks and her move to Santa Clarita

Scott Volk met appellant over the Internet around January 1998. They began dating. (19RT 2087.) Volk was about 23 years old at the time and appellant was 34 years old, twice-divorced, with five children. Volk lived in Santa Clarita and appellant lived in Perris. (19RT 2088.) The drive between the two communities was about an hour and a half to two hours long. After about "a couple months" of dating, Volk broke up with appellant. Volk felt the situation was "uncomfortable" due to the physical distance between them, her children, and the age difference between him and appellant. (19RT 2089.)

Alethea Volk, Scott's mother, became acquainted with appellant, while appellant was still living in Perris and dating Scott. (20RT 2355.) Alethea spoke with Scott about his relationship with appellant when they broke up in March 1998. After this discussion with Scott, Alethea spoke to appellant. Alethea told appellant that Scott was not interested in raising appellant's five children and that their relationship was not "going to go anywhere." (20RT 2356.)

Appellant had talked with Volk about suicide while she was living in Perris. (19RT 2106.) Appellant told Volk that she planned to commit suicide while her children were visiting their fathers and she would write a

suicide note. Appellant went so far as to write the suicide note while the children were visiting their fathers, but she did not go through with the suicide. (19RT 2106-2107.)

After Volk broke up with appellant, she called Volk and told him that she was moving to Santa Clarita. Volk was surprised and did not want her to move to Santa Clarita because he was in another relationship. Volk had a conversation with appellant about that subject, but she moved to his area, anyway, around the end of March 1998. Volk and appellant resumed their relationship. (19RT 2090.)

Clare Cserney rented a home at 27445 Cherry Creek Drive, Santa Clarita, to appellant in March 1998. (20RT 2306-2307.) Appellant told Cserney that she would be moving into the home with her husband, Fernando Nieves, and three children. Cserney was not aware at that time that appellant was single and had five children. (20RT 2307.) Appellant took a blank rental application from Cserney and returned it with the blanks filled in, including a signature purporting to be from Fernando Nieves. (20RT 2308; Peo. Exh. 25.) Cserney was unaware that after appellant moved into the house, she converted the garage into a bedroom, without Cserney's permission. (20RT 2308-2309.) The home was equipped with a smoke detector that was functioning properly at the time that appellant moved in. (20RT 2335-2336.)[3] Even though there were many children living in the neighborhood, appellant's children never played outside, nor did appellant respond to friendly overtures from the neighbors. (17RT 1675-1677, 1700-1701.)

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[3] The trial court permitted defense counsel to question Cserney as his own witness, out of order, because there was a possibility she would be unavailable during the defense case-in-chief. (20RT 2341.)

Sometime around April 1998, Volk moved into appellant's Santa Clarita home. (19RT 2091.) Volk lived with appellant for about a month to a month and a half, then he moved out. During this period of time, appellant said things to Volk about her ex-husband, Dave Folden, that indicated appellant was not "particularly fond of him." Appellant was not "comfortable" about her two younger daughters being with Folden. Appellant was not working at that time and was living off of the support she received from Folden. (19RT 2092.)

Appellant drove a van at this time and she would usually park it head first in the driveway, about three feet from the garage door." (19RT 2094.) Volk and appellant slept together in the converted garage. (19RT 2093.) There was a fan and vent in the ceiling of the garage; Volk installed the fan himself. Volk was shown a photograph of a blue and white bedspread covering the fan and vent. (Peo. Exh. 5B, D, E.) During the time he lived there, he had never seen a blue and white bedspread covering the fan and vent. (19RT 2094.) Volk was shown a photograph (Peo. Exh. 5F, G) of a gasoline container. He had seen the container before; it was usually by the garage door, in the area of the garage that was used for storage. Volk had never seen the container over by the waterbed in the garage. (19RT 2095-2096.) At the time that he was living there, the gasoline container was about half full. (19RT 2097.)

Other than one occasion when appellant "blacked out" in the shower, Volk never saw appellant have any seizures. Appellant seemed surprised by blacking out in the shower. She thought it was because she had not eaten that day. (23RT 2768.)

Sometime in May 1998, Volk broke off his relationship with appellant and moved out of the house. Appellant had told Volk she was pregnant prior to the break up. Appellant was upset by the break up and tried to talk Volk into staying. (19RT 2098-2099.) Appellant and Volk discussed her

pregnancy, but Volk refused to discuss appellant's "options" with her because it was not his "choice." Volk told appellant that he would not deny being the child's father; however, he "didn't want to be involved in the situation [he] was involved with." (19RT 2099.) Volk was dating someone else. Appellant was aware of this other relationship, as she and Volk had discussed it before. (19RT 2100-2101.) After he broke up with appellant, sometime in June, Volk left appellant a message on her answering machine telling appellant she could be the "best man" at Volk's marriage to his other girlfriend. (23RT 2755.)

Sometime in June, Alethea found out that appellant was pregnant. (20RT 2357-2358.) Alethea spoke with appellant on the morning of June 30, 1998. Appellant called to tell Alethea that she had changed her telephone number, and she wanted Alethea to have it. Appellant seemed angry, depressed, and upset. (20RT 2358.)

Scott received a page from appellant at 1:06 p.m. on July 1, 1998. The numeric message was "911, 911, 263." Volk assumed the message was from appellant, because "263" was the first three numbers of appellant's telephone number. (19RT 2101.) Volk was at lunch when he received this page. When he returned to the office, there was a voicemail on his office telephone from appellant, also received at 1:06 p.m. In the message appellant stated there had been a fire. (19RT 2103; Peo. Exh. 19-A, B.) Volk called Alethea and asked her to call appellant and then let him know what was going on. (19RT 2104-2105.) Alethea called Volk back a short time later and told him that "something had happened" and to come right away to appellant's home. (19RT 2106.)

That same day, Volk received a letter from appellant. The letter said "Scott, I've <u>always</u> loved you -- [¶] I'm sorry if my love wasn't good enough for you. [¶] I was always here for you -- [¶] You just couldn't see it. Now you never will. [¶] I can't live without you in my life -- [¶] You

chose to leave and you took my soul, not just my heart -- [¶] I have nothing left [,] you took it all[.] [¶] I can't do this anymore. [¶] I've just been run over & had my heart ripped out one to [*sic*] many times! [¶] It's not your fault -- I allowed it and I guess asked for it -? [¶] Here's some pics too -- I've always loved -- you -- And I always will[,] Sandi[.]" Volk turned the letter over to the police. (19RT 2107; Peo. Exh. 20 [underlining in original].)

Appellant also sent Alethea a letter postmarked June 29, 1998. (20RT 2359; Peo. Exh. 27.) In the letter, appellant told Alethea that her ex-husband wanted to "back out of the adoption" of her older three children because he did not want to support them. Appellant also wrote that she had almost no friends in Santa Clarita, spent her weekends alone without her children, could not go out dancing or on a date, and was sick and getting fatter. Appellant further wrote that she could not find a job and was unable to focus on a future career in law enforcement as she had been before she became involved with Scott. Appellant felt betrayed and lied to and abandoned. She wrote, "I cannot live my life like this -- I am going crazy! The walls are closing in on me!" Appellant further wrote that she had aborted her pregnancy on June 25th, Thursday afternoon, and that prior to that, she had felt suicidal on Wednesday night. (Peo. Exh. 27.) Alethea was surprised to read about the abortion, because appellant had not discussed an abortion with her. (20RT 2361.)

Alethea received another letter from appellant that was dated June 30, 1998. (20RT 2366-2367; Peo. Exh. 28.) In the letter appellant gave Alethea a check for a freezer. Appellant further wrote, "I was right. I knew I wouldn't be able to handle terminating my pregnancy. I'm having a very hard time knowing I killed my baby. Maybe it's post-partum blues? I'm crying 24-7. I hope it gets easier soon. [¶] I don't blame you if you hate me -- I hate myself right now for the decision I made. I truely [*sic*] wish

things had been different with Scott. I still love him so damn much! [¶] I hope he will have a long happy life now that he won't have to worry about me and a baby. [¶] I will love him forever!! He holds my soul!" The letter was signed, "Thanks for being my friend -- Sandi" (Peo. Exh. 28, underlining in original.)

Appellant also sent Cserney a rent check in an envelope postmarked June 30, 1998. (20RT 2310-2311; Peo. Exh. 26.) Inside the envelope, along with the rent check, was a note from appellant saying, "Have a happy 4th," with a "happy face," signed "Sandi." (20RT 2311-2312.)

2. The slumber party

David Nieves was 15 and a half at the time of his testimony. Appellant was his mother and Fernando Nieves was his father. (21RT 2389-2390.) In June 1998, David lived at the Cherry Creek address with appellant and his four sisters: Nikolet (12), Rashel (11), Kristl (7), and Jaqlene (5). (21RT 2391.) David was close to his sisters and spent most of his time with them. (21RT 2391-2392.) David and his sisters were not allowed to go in the front yard and to play at other children's houses. He and his sisters would play in the back yard. (21RT 2419.) Every other weekend David and his sisters would stay at his father's house. David's name was originally Fernando David Nieves, but appellant changed it to David Anthony Folden when Dave Folden adopted him. (21RT 2421-2422.) After appellant divorced Dave Folden, she told David "bad things" about Folden so that David would not want to go see him. (22RT 2621-2622.)

On June 30, 1998, appellant told David and his sisters that they were going to have a slumber party at their home in the kitchen. They had never had a slumber party in the kitchen before, and David told appellant he did not want to sleep in the kitchen. (21RT 2392.) Appellant told David that he had to. (21RT 2393.) David was afraid to disobey appellant, because

she would "whip" him with a big wooden spoon. (22RT 2609.) David and his sisters put down blankets on the floor. They watched two movies and ate popcorn. (21RT 2393.) While the children watched the movies, appellant was in the living room talking on the telephone. (21RT 2393-2394.) Kristl and Jaqlene fell asleep during the first movie, Nikolet fell asleep during the second movie, and David and Rashel fell asleep after the second movie. Before David fell asleep, appellant came in the kitchen and put wooden dowels in the sliding glass door in the kitchen and in the kitchen window on the northeast side. (21RT 2394.) Once the dowels were in place, the window and the sliding glass door could not be opened. All of the windows in the kitchen were closed. The oven was not in use and was never used to heat the kitchen. David fell asleep. (21RT 2396, 2405, 2414.)

A short time later, appellant shook him and David woke up coughing. David could not breath because of smoke that was stinging his nose and eyes. (21RT 2396-2397.) It was dark in the kitchen. (21RT 2398.) David could hear appellant and his sisters coughing. David asked appellant if they could leave and go outside. Appellant told him "no, because it [the smoke] could be coming from outside." David stayed where he was because he believed and trusted appellant. He and his sisters always did what appellant told them to do. (21RT 2397.)

Nikolet asked appellant if she could go to the bathroom to throw up. Appellant told her to "puke" on the floor where she was sleeping. (21RT 2398.) David could hear Nikolet vomiting. Appellant told the children to put their faces in their pillows and covers and breathe into those. David did as he was told because he thought it would prevent him from breathing in the smoke. David did not hear anything else from his sisters. He lost consciousness. (21RT 2399.)

When David regained consciousness, the kitchen was dark. Everything was still, but David could still smell smoke. David got up to use the bathroom, where he urinated and vomited. (21RT 2400.) He noticed the floor was burned, and that his and his sisters' bedrooms were also burned. When David went back to the kitchen, he got some grape juice out of a pitcher in the refrigerator. (21RT 2401-2403.) David then lay back down because he was feeling dizzy. (21RT 2403.) He could not think clearly. (21RT 2404.) David looked at his sisters. They were not moving and there was foam coming out of their mouths. (21RT 2406.) David thought the girls were just drooling in their sleep. David lost consciousness again. (21RT 2407.)

When David woke up a third time, it was light outside. The girls were not awake and they were not moving. They still had foam on their faces. David thought the girls were still sleeping. (21RT 2407-2408.) David noticed the sliding glass door and a kitchen window were now open. He got up and went to use the restroom. Appellant was in the restroom. (21RT 2408, 2412.) When she left the restroom David asked her what had happened. Appellant did not give an answer and she went into the living room. David went to the bathroom and urinated. After he left the bathroom, David went into the living room, where appellant was on the telephone. David asked appellant if he could have a popsicle. (21RT 2409.) Appellant said yes and David got a popsicle from the freezer in the kitchen. (21RT 2410.) David sat down at a table in the kitchen and ate the popsicle. (21RT 2410-2411.) David finished the popsicle and went back to the living room. Appellant was just getting off of the telephone. David sat down next to her on the couch. Appellant drank out of the same pitcher David had drank from earlier. (21RT 2411-2412.)

David and appellant sat on the couch for a few minutes and then the fire department arrived. The paramedics took David and appellant outside.

(21RT 2412-2413.) They sat on the lawn and the paramedics gave them oxygen. One of the paramedics came out from the house and told David and appellant that the girls were dead. David was "shocked." David and appellant were then taken to the hospital. (21RT 2413.)

David stayed in the hospital for three or four days. When he was released, he went to live with his father, Fernando Nieves, and his stepmother, Charlotte Nieves. (21RT 2414.)

David testified that the red gasoline can found near the waterbed in the converted garage was usually kept in the corner on the storage side of the garage. He had never seen it by the waterbed before. (21RT 2415-2416.) The red gas can had been used for the lawnmower, but they did not need it at the Cherry Creek address, because they had a gardener. (21RT 2419.) Appellant always parked her van forward in the driveway. She never backed the van in the driveway. (21RT 2417.)

David had been taught about fire safety at school and by his father. Fernando showed David how to get out of the house if there were a fire. The reason David stayed in the house on July 1, even though he smelled smoke, was because he did what appellant told him to do and he believed what she said. (21RT 2418.) David did not start the fire. (22RT 2625.)

3. Events after appellant sets her house on fire

Gregg Lewison, a sergeant in the sheriff's department, was appellant's next door neighbor on Cherry Creek Drive. (17RT 1699.) Sometime between midnight and 3:00 a.m. on July 1, 1998, Lewison woke up when he smelled smoke. It was a warm night and Lewison's bedroom window was open. (17RT 1702-1703.) Later that day, Lewison saw appellant's van backed against her garage door, which was unusual because appellant usually parked the van head-in, leaving enough room to walk between the van and the garage door. (17RT 1703.)

Maryse Ford lived on Cherry Creek Drive, across the street and two doors down from appellant's home. (17RT 1664-1665.) Around 3:30 a.m. on July 1, 1998, Ford woke up to use the bathroom. Her windows were open because it was a warm night. She smelled smoke coming from her bedroom window. Worried by the smell, Ford checked her home and determined it was not on fire. (17RT 1665, 1673.)

Benjamin Dibene lived seven houses from appellant. (17RT 1674.) Dibene went outside on the morning of July 1, 1998, at around 7:00 a.m. He smelled smoke. Later that morning, around 10:00 a.m., Dibene noticed a van backed into appellant's driveway. (17RT 1677.) Dibene had seen the van before, parked head in. He had never before seen the van parked up against the garage door. (17RT 1678.)

Katherine Castorino answered a 911 call from appellant on July 1, 1998, at 1:09 p.m. (16RT 1474-1475.)[4] Appellant stated there had been a fire and the house was "awful smoky" and "charred." (1RCT 3.) Appellant could "barely walk" and she did not have "a clue" as to how the fire started. Appellant stated that she slept through the fire and did not know how the fire went out. She further stated she was not on any medications. (1RCT 4.) Appellant said her son was awake but her girls were on the kitchen floor and she did not know if they were asleep or injured. Appellant was transferred by Castorino to a paramedic. (1RCT 5.) Appellant told the paramedic there had been a fire at her home "last night" and when she awoke, everything was "black" but the fire had gone out. (1RCT 6-7.) The paramedic advised appellant to try to get her children out of the house. (1RCT 7-8.) Castorino advised the paramedic, "It sounds like she might be

[4] The jurors heard a tape of the call (Peo. Exh. 1-A) and were provided with transcripts of the tape. (16RT 1476.)

a 5150" and the paramedic responded, "I know that."[5] (1RCT 8.) The paramedic asked appellant if she were "thinking about suicide or anything," and appellant responded, "no." (1RCT 9-10.) The paramedic asked appellant whether she heard or felt the fire, and appellant responded, "It was hard to breath, but then--" The paramedic then asked appellant, "But you just decided not to get up?" and appellant responded, "No, it was hard to breath and I couldn't [. . . .]" (1RCT 10.) Appellant told the paramedic she was not taking any medication. (1RCT 11.) The paramedic asked appellant if she had been "feeling depressed lately," and appellant responded "no." She also denied having any "medical conditions." (1RCT 12.)

Bruce Alpern, a firefighter paramedic, responded to the 911 call. He and his partner Gary Reichman, arrived at appellant's home on Cherry Creek Drive approximately three minutes after receiving the 911 call. (16RT 1497-1499.) Alpern noticed a van in the driveway of the home. The van was touching the garage door, preventing anyone from exiting the garage through that door. (16RT 1499-1501.)

Alpern and Reichman approached the front door and knocked. (16RT 1501.) Less than a minute later, appellant answered the door. (16RT 1501-1502.) Appellant was covered in soot from "face to feet." Once she opened the door, appellant did not say anything, but instead started walking back to the couch to sit back down. David was also sitting on the couch. Alpern asked appellant and David to step out of the house. (16RT 1502-1503.)

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[5] Welfare and Institutions Code section 5150 authorizes law enforcement and other professionals to place a dangerous or gravely disabled person in a mental health facility for a 72-hour period of treatment and evaluation.

Alpern noticed obvious signs that there had been a fire in the house: the walls were covered in soot and "completely darkened." The fire appeared to have been out for several hours. He and Reichman escorted appellant and David out of the house and told them to sit down on the grass. Alpern walked back to the kitchen, where he saw four bodies lying in the middle of the kitchen floor. There were vertical blinds covering an open sliding glass door in the kitchen, which led to the patio area. These blinds were drawn and it was dark, so Alpern pulled down the blinds. (16RT 1504, 1506-1507, 1517, 1536.) Alpern saw foam coming from the noses and mouths of the victims. The victims were obviously dead. (16RT 1508.)

Alpern observed that the victims were lying on sleeping bags and blankets. (16RT 1509.) After determining that the victims were deceased, Alpern and Reichman walked through the house looking for other victims. They found a gas can in the garage. The garage had been converted into a bedroom and the gas can was next to a waterbed in the garage. (16RT 1510-1511.) There was a pour spout attached to the gas can. (16RT 1512.)

Alpern also observed that the stove door was open and a burnt dish towel and burnt plastic table cloth were inside the oven. (16RT 1512.) There was a cigarette lighter on a kitchen counter and a dead cat in the kitchen area. (16RT 1513.) There was soot on the lighter. (26RT 3406-3408.) Alpern did not open any windows in the house. Other than the sliding glass door in the kitchen, which was open, the only window that was open in the house when Alpern walked through was a window in the northwest corner of the kitchen. (16RT 1519.) The hallway smelled like gasoline. (16RT 1514.) Alpern observed what looked like gasoline poured on the hallway carpet and in two bedrooms, which had been ignited. Alpern did not smell natural gas or methane in the house. (16RT 1516.)

Firefighter John Harm walked through appellant's kitchen and noticed heat coming from the stove and that the stove door was open. (16RT 1630.) The stove was hot to the touch. The top of the stove seemed cooler than the front, indicating that the oven was the source of heat. There was no gas flowing from the stove and no smell of gas. Harm observed burn patterns on the hallway carpet, in the bedroom and in the bathroom. He went into the converted garage/bedroom and saw a two-gallon red gas can that smelled like gasoline. There was about an inch or two of gasoline in the can. (16RT 1631, 1643.) Harm noted that there was a fan vent in the garage that was covered with a piece of plastic, which Harm found "strange" in July. (16RT 1632.)

Alpern went back outside and asked appellant if anybody else was in the home. Appellant stated, "My kids. How are my kids?" Alpern responded, "Your kids are dead." Appellant responded, "Oh." She made no other statement, asked no other questions about her children, and did not cry or show any emotion. (16RT 1520-1521.) Appellant appeared to be alert and oriented, and she did not have any complaints such as headache or dizziness. Appellant did not appear to be disoriented. (16RT 1521.)

Appellant and her son were eventually transported to the hospital. Appellant did not ask any questions or display any emotion on the eight to ten minute ride to the hospital. (16RT 1522.)

4. Appellant and David are hospitalized

Yolanda Collins was on duty as a registered nurse at Henry Mayo Newhall Hospital on July 1, 1998, when appellant was brought into the emergency room at 2:00 p.m. (20RT 2257.) Appellant was wearing a t-shirt, shorts, and underwear. Collins collected the clothing from appellant and placed it in a plastic bag. She then put the plastic bag inside a brown paper bag and gave it to Deputy Michael Wilson. (20RT 2258.)

Cathy Spaid was also a registered nurse working in the emergency room, She treated David when he was brought in. (20RT 2291-2292.) David was covered in soot and Nurse Spaid cleaned him up. She did not make any notations in the medical report about any burns on his fingers or hands. She would have indicated in the report if she had seen any burns on David's fingers or hands. (20RT 2292-2293.) Nurse Spaid collected David's clothing, put it in a brown paper bag, and gave the bag to Deputy Wilson. (20RT 2293-2294.)

After collecting the two sets of clothing, each in a brown paper bag, Deputy Wilson turned the bags over to Deputy Arnold. (20RT 2241-2246.) Deputy Anthony Arnold took the bags from Deputy Wilson and took them back to the crime scene, where he turned them over to Detective Robert Taylor. (20RT 2253-2254.)

Nurse Collins had a conversation with appellant in the emergency room. She asked appellant what had happened and if she was taking any medications. Appellant stated she was taking antibiotics because she had just had an abortion. (20RT 2259-2260.) She stated she did not know what happened. (20RT 2267.) Appellant also stated that she was depressed because of the abortion, her boyfriend had broken up with her, and one of her ex-husbands was trying to get custody of the kids. (20RT 2261-2262.) She never mentioned depression because of the deaths of her four daughters. (20RT 2284-2285.) Appellant did not complain of dizziness, vomiting, or nausea. (20RT 2262.) Appellant also stated that she was hungry. (20RT 2263.)

Dr. Charanjit Saroa examined appellant at 8:00 p.m. on July 1st. (20RT 2204-2205.) Appellant was in the intensive care unit at the time, suffering from smoke inhalation. (20RT 2205.) Dr. Saroa observed that appellant had soot in her nose and burnt nose hair. Soot does not cause burnt nose hairs, but a flame does. (20RT 2206.) Appellant was coughing

and wheezing, but was awake and alert. Dr. Saroa asked appellant about her medical history. Appellant stated she had recently had an abortion. She did not say anything about prior blackouts, seizures, organic brain disease, or dissociative states. (20RT 2207-2208.) Appellant stated she was taking doxycycline, an antibiotic. There was no indication in the doctor's records that appellant told him she was taking Prozac or Zoloft. (20RT 2208.) Appellant's carbon monoxide level was 7.7 percent. (20RT 2209.) That level is considered "pretty low," similar to the level in a two-pack-a-day smoker. Dr. Saroa classified that level as "mild" carbon monoxide poisoning. Dr. Saroa would not expect a person with that level of carbon monoxide in his or her system to be disoriented, lethargic, forgetful, or to exhibit bizarre behavior. (20RT 2234-2235.) Appellant did not show any of those symptoms when Dr. Saroa examined her. (20RT 2235.)

Dr. Saroa also examined David Nieves. David was awake and alert. His carbon monoxide level was 10.8 percent. (20RT 2209.) David did not have any burns on him. (20RT 2210; 26RT 3403.)

Fernando and Charlotte Nieves drove to the hospital and saw David around 2:00 a.m. on July 2, 1998. David appeared dazed, dirty, and "very, very frightened." (23RT 2826.) David said to Fernando, "Why am I still alive, Dad? Why ain't I dead, too?" Fernando held David's hands. (23RT 2827.) Fernando tightly squeezed David's hands, but David never complained about pain from a burn. Fernando looked at David's hands and did not see any burns. David was not given any ointment or other treatment for burns when was released from the hospital. (23RT 2828.) When David left the hospital, he went to live with Fernando. (23RT 2828-2829.)

5. The children are autopsied

Dr. James Ribe performed the autopsy of five-year-old Jaqlene Folden on July 2, 1998. (17RT 1720-1722.) Dr. Ribe determined the cause of her

death was "[i]nhalation of products of combustion," which "basically means smoke inhalation." The term "products of combustion" is a technical term that includes, but is not limited to heated air, carbon monoxide, carbon dioxide, and black particles or "soot." (17RT 1723-1724.) There were no burns on Jaqlene's body and her death was not instantaneous. Based on the swelling of her brain, which was "quite severe," and the swelling of her lungs, Dr. Ribe opined that her death took a period of time, between 30 minutes and a few hours. (17RT 1725-1726.) There was white foam coming from Jaqlene's mouth and nose. (17RT 1728-1729.) The foam was pulmonary edema fluid that had been expelled from the lungs after death. (17RT 1730-1731; Peo. Exh. 4-D.)

Dr. Ribe also performed the autopsy of seven-year-old Kristl Folden on July 3, 1998. (17RT 1733, 1746; Peo. Exh. 4-A.) The cause of Kristl's death was the same as Jaqlene, the inhalation of products of combustion. (17RT 1734.) Further, Dr. Ribe supervised the autopsies of Rashel Folden and Nikolet Folden and was present when Dr. Stephanie Erlich performed the autopsies on the girls. Dr. Ribe opined that 11-year-old Rashel and 12-year-old Nikolet also died of inhalation of products of combustion. (18RT 1830-1831, 1833-1834.) There were no burns on the outside of their bodies, but there were internal burn signs on the trachea, larynx, and bronchi. (18RT 1852.) The internal injuries could have been "excruciatingly painful" if the person was conscious. (18RT 1853.) Dr. Ribe opined that the girls did not die a rapid death. (17RT 1806.)

6. The arson investigation

Los Angeles County Sheriff's Department Sergeant John Ament testified as the prosecution's arson expert. (18RT 1876-1878.) Ament arrived at appellant's house at about 3:15 p.m. on July 1, 1998. (18RT 1878.) He noticed a van was backed into the driveway, so that it was

physically touching and blocking the garage door, indicating the fire was intentionally set. (18RT 1879.)

Ament examined the house's exterior. He did not see any indication of soot outside the home, which indicated to him that there were no open windows in the house. (18RT 1880-1881.) Ament did not enter the house until 6:00 p.m., when a search warrant was obtained. (18RT 1882.) Upon entering the home, Ament noticed all of the contents of the living room were covered in soot. (18RT 1883.) It was very dark inside the living room and the officers needed to use flashlights. (18RT 1884-1885.) They walked into the kitchen and Ament saw the four bodies on the floor. Ament saw a distinct sooty footprint on the floor near the sliding glass door area, near where one of the victims was laying. (18RT 1885-1886.) The oven door was open and there was a scorched dish towel on the open door, along with a scorched plastic tablecloth and a scorched portion of a rug on the floor. (18RT 1887.) The face of the oven looked like it had been under "pretty intense heat" for a long period of time, because the clock face on top was "somewhat melted." (18RT 1887-1888.) Ament examined the windows and sliding glass door in the kitchen and determined that they had all been closed at the time of the fire, based on soot marks on the windows and sliding glass door. (18RT 1890-1891.)

Ament examined the hallway and observed a burn area that was approximately ten feet long and almost covered the entire width of the hallway. There was an irregular shape to the burn area on the carpet, which was indicative of a flammable fluid being poured on the surface and ignited. The smoke alarm had melted and was on the ground. There was no battery in the smoke alarm. (18RT 1894, 1896.)

Ament walked back towards the back bedrooms. Just inside the doorway of the northwest bedroom there was a burn area that was approximately one foot by a foot and a half to two feet long. The burn area

was irregularly shaped. (18RT 1896.) In the southwest bedroom was a "trailer," a trail of flammable liquid that was poured on the carpet that ran from just outside the entryway to that bedroom to the inside of the bedroom, approximately five feet long and a couple of inches wide. The trailer ran all the way to another pour area that was about one foot by three feet. The pour area was irregularly shaped and was consistent with a pour pattern from a flammable liquid. (18RT 1897.)

Ament opined that the heavy soot that was seen throughout the house was caused by gasoline, which produces a heavy, thick, oily smoke. Additionally, the carpet was a synthetic material which, when burned, produces a heavy soot. (18RT 1903.) The fire started in three independent areas in the hallway and bedrooms. Gasoline was poured in those areas and the vapors were ignited with an open flame, probably from the lighter found in the kitchen. (18RT 1904, 1908, 1917.) Based on his training and expertise, Ament opined that the fires were deliberately and intentionally set. At the time that he collected carpet samples, Ament smelled gasoline. Ament opined that approximately one to one and a half gallons of gasoline was poured. There was a two-gallon gas container found in the converted bedroom/garage that was about an eighth to a quarter full. (18RT 1905-1906.) The gas container's pour spout was open and there was soot on the container, meaning the container was inside the house at the time of the fire. (18RT 1906-1907.) Ament opined that the fire burned out because it "was poorly ventilated." (18RT 1907.)

There was also a fourth location where there was an attempt to start a fire: the oven. Ament opined that the oven was on for an extended period of time, which caused scorching to a towel, a tablecloth, and a rug that was placed inside the oven. All of these fires and attempts were deliberate and intentional. Ament ruled out accidental causes of the fires, nor were there signs of electrical problems. (18RT 1917.)

Ament opined that the person who lit the fire intended to burn the house down. (18RT 1918.) The fire probably burned for no more than 15 or 20 minutes. If there had been an open window, the house would have burned down. (18RT 1919-1920, 1935.)

7. Appellant's relationships with her ex-husbands

Appellant was married twice: first to Fernando Nieves and then to Dave Folden. Folden had at one time been married to appellant's mother, and thus had been appellant's stepfather. (24RT 3025.) In the over 20 years that Fernando had known appellant, he had never seen her have black-outs, seizures, or loss of consciousness. (23RT 2834.) Likewise, in the 20 years that Folden knew appellant, he never knew her to have blackouts, fainting spells, or seizures. Moreover, appellant never told Folden that she suffered from blackouts, fainting spells, or seizures. Folden never knew appellant to take any medications for blackouts, fainting spells, or seizures. (24RT 3026-3027.)

Fernando Nieves testified that he met appellant when he was 15 years old. (23RT 2784.) Fernando had also known Dave Folden since he was a child, when Folden was dating appellant's mother. (23RT 2787.) Fernando and appellant married in 1983 and together they had three children: David, Nikolet, and Rashel. (23RT 2785.) Their relationship was tumultuous. They separated in 1985, then again in 1986, and finally divorced in 1987. Appellant left Fernando and took the children while Fernando was in the military and stationed in Germany. (23RT 2786-2787.) Fernando did not see his children between 1987 and 1989. (23RT 2788.) Fernando remarried in 1988 and subsequently moved to Victorville in 1992. He and his wife, Charlotte, had two daughters: Christine and Jacqueline. (23RT 2789.)

Meanwhile, appellant and Folden began a relationship and married in 1989. Appellant and Folden went on to have two daughter, Kristl (born August 1990) and Jaqlene (born November 1992).

In 1994, Folden adopted appellant's three children from her prior marriage to Fernando. It was appellant's idea for Folden to adopt the children. Folden rejected the idea at first, but appellant brought it up again, and Folden agreed. (24RT 3026, 3028-3030.) At the same time, appellant changed the name of her son, from Fernando David, to David Anthony. Appellant told Folden that she changed her son's name because she did not want Fernando Nieves in her life or the lives of her children. (24RT 3030.) Folden loved his adopted children. (24RT 3029.)

Fernando allowed Folden to adopt Fernando's three children because he believed it was in the best interests of the children. Fernando worried that if he did not sign the necessary papers, he would have to hire a lawyer and go to court. Appellant told Fernando the adoption was for tax purposes and that Fernando would still be able to visit his children. (23RT 2788, 2790, 2792, 2797-2798.) However, after the adoption was finalized in 1994, Fernando was not allowed to see his children as appellant had promised. Appellant told Fernando not to come around, or she would get a restraining order against him or have him arrested. His cards and letters to the children were returned to him, with notes telling him to "stay away." (23RT 2799.) Fernando gave up trying to stay in touch with his children. (23RT 2799-2800.)

In 1995, appellant left Folden. She took the children and went to Indiana. She returned with the children because Folden went to court and got a court order. (24RT 3081.) Folden tried to make the marriage work after appellant returned from Indiana. (24RT 3085.)

In 1996, appellant decided she wanted to get together with Fernando's family, so that his two daughters could become acquainted with their

siblings. The two families had a joint outing to Lake Perris. Fernando was allowed to have visitation with the children from that point on. (23RT 2802; 24RT 3032-3033.) During this period of time, appellant told Fernando she was having problems in her marriage with Dave Folden. (23RT 2803.) Appellant would insist that Fernando take all five of the children for visits, not just his children, but also the two girls appellant had through Folden, Kristl and Jaqlene. Fernando had no problem with this because the two younger girls were well-behaved. (23RT 2804.) Beginning in 1996 and into 1997, Fernando saw the children many times, including almost every weekend and holidays. (23RT 2805.) Appellant sometimes stayed over with the children, and she became friendly with Charlotte. (23RT 2807.) While the children were with Fernando, he taught them about fire safety, including fire drills and the need to get out of the house during a fire. (23RT 2805-2806.)

Folden and appellant separated in March 1997 and the divorce was final in August 1997. The divorce was appellant's decision. (24RT 3027, 3088.) Folden and appellant no longer got along, there was no communication, and appellant "had her own way of doing things, and it was her way or no way." (24RT 3027-3028.)

In the early part of 1997, Fernando and appellant resumed an "intimate" relationship, that is, they had an affair. Fernando was "unfaithful" once in March and once in April 1997. (23RT 2807-2808.) Appellant then sent Fernando a letter and then another letter with a will attached in May 1997. (23RT 2808, 2813-2814, 2816; Peo. Exh. 32, 33.) The will gave Fernando custody of the children if they were to survive appellant. (23RT 2817.) The letter told Fernando that if anything were to happen to appellant, he should look to Folden or Folden's son as responsible. (23RT 2817.)

Fernando took steps to end the relationship and he told his wife, Charlotte. (23RT 2814.) When Fernando made it clear to appellant that the affair was over, she became angry. She sent Fernando a letter that said, in part, "As far as you're concerned, I and the children have fallen off the face of the earth. Do not look for us. Do not try to find us. Do not contact us." (23RT 2814-2815.) However, about a month later appellant changed her mind and let Fernando resume seeing the children. (23RT 2815.) Appellant faxed a letter to Charlotte, giving Charlotte the details of her affair with Fernando. (23RT 2818.)

Appellant wrote a letter to Fernando in March 1998, that caused Fernando to contact the Department of Child Protective Services. Fernando was concerned because appellant was going to school at night and leaving David, then 13, alone to babysit the other four girls at night without any other supervision. Fernando hoped he might be able to get back his parental rights. (23RT 2820.)

Appellant told Fernando about her relationship with Scott Volk. Fernando helped appellant move to Santa Clarita after she and Volk broke up. Fernando kept in touch with the children even after the children and appellant moved to Santa Clarita. (23RT 2821.) Fernando, however, never signed a rental agreement as appellant's husband for the Santa Clarita home. Fernando was shown a rental application with a signature purporting to be his own. Fernando denied ever signing his name to the application. Fernando told appellant she could use him as a reference, but that was all. He did not give her permission to forge his name. (23RT 2822; Peo. Exh. 24, 25.)

Appellant did not tell Folden in advance that she was moving from Perris to Santa Clarita or that she was taking the children out of school. Prior to the move, Folden would visit the children twice during the week and every other weekend. (24RT 3033.) Even after the move, which

required Folden to drive 240 miles round trip between Perris and Santa Clarita, Folden never missed a visit. At first, Folden saw the three older children as often as he saw his own two younger daughters. But the attitudes of the three older children began to change, and they chose not to see Folden. (24RT 3034.)

In May 1998, Folden went to court to set aside the adoption of the three oldest children. Folden did this because Fernando was now regularly visiting his biological children, and Folden did not feel he should be supporting the three children if they were not coming to his home for visitation. (24RT 3035.) A court date was scheduled for July 2, 1998. (24RT 3040.)

On June 25, 1998, appellant called Fernando and asked him to take the three older children for the weekend so she could abort Volk's baby.[6] (23RT 2822-2823; 24RT 3003.) Fernando picked up the children from appellant's friend's house in Perris, and he returned them to their Santa Clarita home on June 28, 1998. (23RT 2823.) When Fernando dropped off the children, appellant told him that Folden had served her with court documents to annul his adoption of Fernando's children. Appellant was furious. (23RT 2824.) She was afraid she would lose child support payments for the three older children. (24RT 3005.) That was the last time that Fernando ever spoke to appellant or the children. (23RT 2825.)

Folden had visitation with his two daughters, Kristl and Jaqlene, on the weekend of the 27th and 28th of June. He returned the girls to Santa Clarita on Sunday night, June 28. That was the last time he saw or spoke with his daughters. (24RT 3036.)

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[6] Appellant had made a list of "pros and cons of abortion." (26RT 3411, 3511; Def. Exh. T.)

After the fire, on July 4, 1998, Folden went to his mailbox and saw an envelope from appellant, postmarked July 1, 1998. (24RT 3037-3038; Peo. Exh. 36-A.) The envelope contained a letter on appellant's stationary and court documents for setting aside the adoption of the three oldest children. (24RT 3038-3040.) The letter said, "Now you don't have to support any of us. FUCK YOU you are scum!" (24RT 3098; Peo. Exh. 36-B, emphasis in original.) The next day, Folden gave the envelope and its contents to Detective Taylor. (24RT 3040; 26RT 3404.)

8. Forensic evidence

Bonnie Cheng, a forensic DNA analyst at SERI Laboratory, performed DNA testing in this case, using polymerase chain reaction (PCR) DNA testing, which is a method used on minute samples of DNA. (25RT 3197-3199, 3203.) In November 1998, Cheng received (1) a known blood sample from appellant and (2) an unknown sample from the sealed flap of an envelope addressed to Dave Folden (Peo. Exh. 36-A). (25RT 3204-3205, 3339-3340.) Cheng analyzed the blood sample from appellant and developed a DNA profile from that sample. She also determined that there was saliva present on the envelope sample. She analyzed the saliva and developed a DNA profile from that sample. (25RT 3206.) Cheng compared the profiles, and determined that she could not eliminate appellant as a possible contributor of the saliva on the envelope flap. Cheng estimated that she would expect to see this particular DNA pattern in about one in 76,000 persons. (25RT 3214-3215.)

In May 2000, Gary Harmor, a forensic serologist with SERI, received a reference blood stain from appellant, an oral swab from David, and a portion of a glue flap from the envelope that Dave Folden found in his mailbox on July 4, 1998. (25RT 3217-3218, 3223; see 24RT 3037-3038.) He compared a DNA profile obtained from David's reference sample with a profile obtained from the envelope seal. Harmor concluded that David

could be excluded as a possible contributor of the saliva on the envelope flap. (25RT 3218-3219, 3223, 3228-3229, 3231-3232.) Harmor also concluded that appellant could not be excluded as a primary donor. (25RT 3230.) Using the modified product rule, Harmor estimated that the frequency of the profile from the envelope flap and appellant's reference sample was one out of 450 billion. (25RT 3233.) It was Harmor's expert opinion that the saliva on the envelope flap was from appellant. (25RT 3238.)

Sheriff's department senior criminalist Karla Taylor analyzed the gas container found in appellant's bedroom. (25RT 3244-3245, 3247.) Taylor developed three latent fingerprints from the bottom of the gas can, which she photographed. (25RT 3248.) Taylor also developed and photographed one latent print from the envelope and two latent prints from the court documents left in Folden's mail box. (25RT 3262-3264; Peo. Exh. 36.) Taylor submitted the latent prints to Don Keir on July 7, 1998. (25RT 3262.)

Keir, a forensic identification specialist employed by the sheriff's department, compared the latent prints developed by Taylor with an exemplar of appellant's fingerprints that he rolled the morning of his testimony. (25RT 3289-3292.) Appellant's right index fingerprint matched the latent print found on the back of one of the court documents left in Folden's mail box. (25RT 3293; Peo. Exh. 36-C.) Appellant's left middle fingerprint, left ring fingerprint, and left little fingerprint were found on the bottom of the gas can. (25RT 3296-3297, 3319-3320.) The location of the fingerprints on the bottom of the gas can were consistent with having been laid down at the same time and were consistent with a person pouring from the gas can. (25RT 3300.) Keir also rolled a print from appellant's foot, compared it with a latent print of a foot taken from a location four inches

from the sliding glass door in appellant's kitchen on July 1, 1998, and determined that there was a match. (25RT 3300-3302, 3321.)

Wesley Grose, a forensic document examiner employed by the sheriff's department, examined various documents in the instant case: a note saying "Have a Happy 4th" with the name "Sandi" at the bottom (Peo. Exh. 26); a note written on two sides that begins, "Scott, I have always loved you (Peo. Exh. 20); and a note that begins "Now you don't have to support any of us" (Peo. Exh. 36-B). (25RT 3323, 3327-3328.) Grose compared People's Exhibits 20 and 26 with People's Exhibit 36-B, and determined that they were all written by the same person. (25RT 3328-3334.) Grose also determined that the note that began, "Scott, I have always loved you" (Peo. Exh. 20) was written on top of the note that began "Now you don't have to support any of us" (Peo. Exh. 36-B), and was consistent with the two notes being attached to the same tablet. (25RT 3337.)

Phil Teramoto, a criminalist at the sheriff's crime lab with an expertise in arson, arrived at the crime scene at 5:20 p.m. on July 1, 1998. Teramoto and Sergeant John Ament went through the house. (28RT 3615-3616.) Teramoto collected carpet samples and carpet pad samples from the hallway and the two bedrooms. He collected a liquid sample from a red plastic container in the converted garage/bedroom. The liquid sample was analyzed and determined to be gasoline. (28RT 3618, 3628-3629.) The carpet and carpet pad samples were analyzed and determined to contain gasoline. (28RT 3630.) He also received two brown paper bags from Detective Taylor that contained clothing from appellant and David. (26RT 3398-3399; 28RT 3621-3623.) Teramoto examined the clothing for the presence of flammable fluids. (28RT 3624.) Teramoto did not find any evidence of flammable fluid, including gasoline, on David's clothing. (28RT 3626; Peo. Exh. 9.) Teramoto examined appellant's clothes and

detected gasoline on her clothing. (28RT 3627; Peo. Exh. 8.) He reexamined appellant's clothes on July 16, 1998, and again the clothes tested positive for gasoline. (28RT 3627-3628.) The clothing and carpet samples were all available to be re-examined, if requested, by an independent expert. (28RT 3631-3632.)

B. Guilt Phase Defense

Deputy Michael Wilson testified that he went to the Henry Mayo Hospital on the afternoon of July 1, 1998, for three reasons: to listen to appellant and David for any spontaneous statements they may have made; to collect their clothing; and to assist the homicide detectives in possible placement of David. (28RT 3678.) Deputy Wilson was in appellant's presence for around 30 minutes during a period of several hours, and he saw appellant appear to go in and out of consciousness two or three times. (28RT 3679, 3681-3682.) Deputy Wilson observed that David's fingertips appeared to be red and burned, and there appeared to be soot under his fingernails. (28RT 3685.) On cross-examination Deputy Wilson testified that he subsequently learned that his observations of David's fingertips were consistent with smoke inhalation or carbon monoxide poisoning. (28RT 3686.) Deputy Wilson also noted that appellant had soot under her fingernails and on the tops and bottoms of her feet. (28RT 3686-3687.)

Detective Taylor showed David photographs of his dead sisters while examining him at the hospital. Detective Taylor may have asked David how he felt about his "dead sisters." (28RT 3690-3691.) Detective Taylor "was trying to get an idea of where David's head was at the time," and Taylor also wanted David to identify his sisters by name and give their dates of birth. David was able to supply the information, which showed that David was "somewhat thinking clearly at the time." (28RT 3692-3693) Detective Taylor also showed David the photographs to see if they

might cause David to make a statement as to whether he had something to do with starting the fire. (28RT 3696.)

Daniel Skipper owned an alarm company that monitored a burglar alarm in appellant's home in Perris. (28RT 3715-3716.) Skipper went to the house and noticed that appellant liked to keep the doors locked at all times and the windows locked and secured with dowels. (28RT 3717-3718.) Appellant also called Skipper out to her house in Santa Clarita sometime in April 1998 to install a burglar alarm system. (28RT 3718, 3725.) Skipper noticed that appellant was equally security conscious at her new home. There was a van in the driveway that was parked two to three feet from the garage door, so that the garage door would not come up all the way. (28RT 3719, 3727.) Skipper went in and out of the house several times during the day that he was there, and each time he returned to the house the door was locked. (28RT 3721.) The windows in the Santa Clarita house were locked and there were dowels in the window frames and the frame for the sliding glass door. (28RT 3722.)

Dr. Gary Ordog, a physician and medical toxicologist associated with Henry Mayo Hospital, took a blood and urine sample from appellant on July 1, 1998. Dr. Ordog found a diet drug -- Phentermine -- in appellant's system. (29RT 3792-3793.) Appellant was screened for tricyclic antidepressants, but she was not screened for serotonin antidepressants, such as Zoloft. (29RT 3794.)

Del Winter, a recently retired fire investigator, inspected appellant's house following the fire, and examined police reports and photographs of the fire scene. Winter also reviewed statements given by appellant and David regarding the fire. (29RT 3803-3807.) Winter opined that the fire was obviously set in several places and a very small amount of gasoline was used. (29RT 3808.) Winter found it odd that the fires were set in locations that were not likely to cause a great amount of damage. Three of

the fires were started on carpet that was fire resistant. Also, the fires were started on flat surfaces that did not burn very well. He also found it odd that the gasoline can was put back in its location. (29RT 3809-3810.) Winter disagreed with Ament's testimony regarding the possible amount of gasoline used to start the fires. Winter thought much less than a gallon and a quarter was used to start the fire. Winter opined that in the two bedrooms probably a half a pint or even less of gasoline was used. It was "impossible" to tell how much gasoline was used in the hallway because of the destruction. (29RT 3811.)[7] If a gallon and a quarter had been poured in the hallway and allowed to vaporize, there would have been a tremendous explosion blowing out windows and killing the perpetrator. Winter had never heard of a person leaving over half the gasoline in a container used to start a fire. (29RT 3812.) The court asked Winter if he had an opinion on whether the fire was intentionally set: Winter's opinion was that the fire was intentionally set. (29RT 3818.) However, readily combustible materials inside the house were not used. (29RT 3819.)

Winter was familiar with the effects of carbon monoxide poisoning: dizziness, headaches, disorientation, lethargy, and judgment lapses. (29RT 3826.) Winter opined that telling the children to breath into their blankets would enhance their chances of survival, because carbon monoxide rises and there is better air at the bottom of a room. (29RT 3828-3829.) Under certain circumstances, it can be more dangerous to people within a home to open a sliding glass door during a fire. (29RT 3831-3832.)

Debbie Wood knew appellant since 1991. They both attended the same Mormon Church in Perris. (30RT 3964.) Appellant and her children were very active in the church. Whenever appellant was in church, she sat

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[7] On cross-examination, Winter opined that about a pint of gasoline was used in the hallway fire. (29RT 3837.)

in the front row. Dave Folden would not participate in church activities. (30RT 3966.) Appellant was a very involved and active mother. She was a very caring mother. Her children were well-behaved. (30RT 3967.) Appellant did not scream, yell, or hit her children. (30RT 3973.) Appellant's weight fluctuated and sometimes varied by as much as one hundred pounds. (30RT 3972.) Appellant was pursuing a career in law enforcement. (30RT 3973.) Appellant was looking forward to the birth of Volk's child. Wood first heard that appellant aborted the baby on June 25, 1998. (30RT 3980.) After the abortion, appellant was very sad and depressed. (30RT 3981.) Appellant regretted having the abortion. (30RT 3981-3982.) The Mormon Church was against abortion. (30RT 3975.)

Wood stayed with appellant the weekend after the abortion. That weekend, appellant received papers from Folden seeking to annul his previous adoption of her three oldest children. Appellant was really upset. Appellant was concerned about what to tell her children. (30RT 3983.) She was also worried about money if Folden's child support ceased. That weekend, appellant went out and got a cat tattooed on her chest. (30RT 3984.) Wood invited appellant to join her and some other friends at the river on July 4th, to rent a motel room and have some fun. (30RT 3986.)

On June 29, while at the Del Mar Fair, appellant told Wood that if she died she could not leave her kids with their father. (30RT 4019.) On June 30, Wood received several voice mails from appellant about her "feuding" with Volk. (30RT 3988.) Wood was working and was unable to return appellant's calls. (30RT 3989.) When they finally spoke later that day, appellant told Wood that Volk had asked appellant if she would be the "best man" at Volk's wedding to another woman. This hurt and depressed appellant. (30RT 3989.) Wood's last conversation with appellant was about 10:30 or 11:00 p.m. that night, and it lasted at least an hour. Appellant was very upset. She joked about having a "date with Bud,"

meaning beer. Appellant had been drinking. (30RT 3990.) She was depressed about the abortion, money, and her failure to find a job in any of the police department she had applied at. (30RT 3991.) Appellant said she was going to write a letter to Volk's mother and tell her about the abortion. (30RT 3992.) Wood told appellant she had to get up for work the next day, but appellant still wanted to talk. Appellant told Wood she would call her "tomorrow." (30RT 3993.) Wood had no inkling that appellant had plans to commit suicide. (30RT 3993-3994.) Appellant had told her on the telephone that night that she had plans to attend a friend's wedding in August. (30RT 4004.)

Rhonda Hill had known appellant for approximately five years at the time of trial. (30RT 4033.) Hill lived in Perris and met appellant at a preschool attended by Hill's daughter and appellant's daughter. Appellant also taught at the preschool. Hill described appellant as an excellent and very loving mother. Hill saw appellant's children outside riding bicycles and roller-skating. (30RT 4034.) Appellant's children were not isolated from other children. Appellant was also active in the Mormon Church. Dave Folden did not regularly participate in church activities. (30RT 4035.) Appellant's children called Hill's children on the telephone. (30RT 4042-4043.) David sent e-mail to Hill's children and her children also sent him e-mail. Hill never saw appellant raise her voice or her hand to her children. Appellant's home in Perris was "very warm and clean." Appellant's weight tended to fluctuate a great deal. (30RT 4043.) Hill was aware of appellant's pregnancy. Appellant talked to Hill about the pregnancy prior to her abortion. (30RT 4045.) Appellant was confused and depressed about the pregnancy. (30RT 4046.) On June 25, 1998, appellant left her children with Hill while appellant went to have the abortion. (30RT 4048.)

After the abortion, appellant was very depressed and regretted having the abortion. (30RT 4049.) On Sunday, June 28th, appellant told Hill that she had received papers from Folden stating that he no longer wanted to be the parent of appellant's three oldest children. Appellant was hurt and concerned that her children would be disappointed by Folden's decision. (30RT 4050.) The following day, appellant and Hill talked about Hill coming to stay with appellant after the 4th of July. Appellant also talked to Hill about attending a wedding on August 1st and going to Castaic Lake within the month. Hill had no idea that appellant was thinking of suicide "or anything like that." (30RT 4050-4051.)

Albert Lucia was appellant's stepfather, having been the first and third husband of appellant's mother. Appellant was 11 months old when Lucia married her mother. Lucia saw appellant daily from that time until she was four years old, when appellant's mother left and took appellant. (37RT 5057, 5076, 5091.) As a child appellant would regularly "take a deep breath and pass out." (37RT 5058.) These incidents happened more often when appellant's mother would scream at and hit appellant. (37RT 5058-5059.) During these incidents appellant would be "out" for 30 seconds to a minute. When appellant was about two years old, Lucia saw her suddenly go limp and start shaking. She fell to the ground and shook all over. Her eyes rolled back and Lucia stuck his finger under her tongue. Lucia rushed her to the hospital. Appellant stayed in the hospital for approximately 10 days, where she was examined, tested, and medicated. (37RT 5059-5060.) Appellant was released from the hospital with medication, but she continued to have seizures about once a month, or more often if her mother was screaming at her. (37RT 5061, 5079.)

Appellant's mother hit appellant and called her names on a daily basis. Her favorite location to hit appellant was on the back of the head. (37RT 5065.) Appellant would fall down or fall against things when hit in

this fashion. Once, when appellant was in a high chair and holding her breath, her mother "smacked" appellant, causing the high chair to fall over and appellant to hit her head on the floor. The fall caused a "big knot about the size of a golf ball on the back of her head." (37RT 5066.) Appellant was unconscious for a couple of minutes. (37RT 5066-5067.) Appellant's mother was also verbally abusive towards appellant: she would always tell appellant she was ugly, and she could do nothing right. (37RT 5067.)

In the year prior to the fire, Albert and his wife Penny, had been in regular contact with appellant by telephone and computer. (30RT 4089, 4103.) Appellant sent Albert and Penny pictures and newsletters about her children. Appellant was concerned about the effect of her divorces on her children. (30RT 4090, 4103-4104.)

The Lucia's last contact with appellant before the fire was on June 30, 1998, when they talked with her on the telephone for 45 minutes to an hour. (30RT 4091, 4105.) Appellant was concerned about her children because Folden wanted to annul his adoption of appellant's three oldest children. Appellant was also concerned because she was trying to get on the police force, with no success. Appellant told the Lucias that she had colored the children's hair and gotten a tattoo. Albert considered the tattoo out of character for appellant. Appellant stated that she was planning on attending a wedding in August. (30RT 4092, 4105-4106.) Appellant had plans to go to a concert and Magic Mountain in the upcoming weeks. (30RT 4093.) Appellant did not say anything about committing suicide. (30RT 4094, 4107.)

Appellant testified on her own behalf. She normally parked her van within a "foot or two or three" of the garage door. (35RT 4783.) Appellant could not recall how she parked her van on June 30, 1998. (35RT 4784.) Appellant could not recall the gasoline container being near her bed. (35RT 4784-4785.)

Appellant was 10 weeks pregnant with Scott Volk's baby on June 24, 1998. Volk did not want the baby. Having an abortion was against appellant's beliefs. Volk's mother encouraged appellant to have the child. Appellant had a week-by-week pregnancy book in her home. (35RT 4785-4786.) On June 24, 1998, appellant created a "pros and cons" of abortion list. (35RT 4787.) On June 25, 1998, appellant decided to have an abortion. (35RT 4790.) She left her children with Rhonda Hill and got the abortion that day. The abortion felt like appellant's "insides were being ripped out." (35RT 4791-4792.) Appellant felt "horrible" after the abortion. (35RT 4792.) That night or the next day, appellant got a tattoo on her chest. (35RT 4793.)

Sometime that weekend, appellant received the adoption annulment papers. She faxed the papers to Fernando to get his opinion on them. Appellant viewed the annulment papers as another abandonment of her children by an important male figure in their lives. Also, the annulment papers meant appellant would no longer receive Folden's support money. (35RT 4793.)

On June 28, 1998, appellant went shopping for clothes for herself. She got sized for a wedding dress for an August wedding. (35RT 4794-4794.) Appellant had plans to watch Alethea Volk's dog on July 4th and to go to the river. She also had plans to get season passes to Magic Mountain. (35RT 4795.) The week after the abortion, appellant started taking diet pills again. She also took the antidepressant Zoloft because she was having a hard time dealing with the abortion. (35RT 4795-4796)[8] Appellant

[8] Appellant testified on cross-examination that after the abortion she was so upset and crying that she was sent to "a little recovery corner" so she could compose herself. (35RT 4828-4829.)

thought it was safe to take Zoloft and the diet pills at the same time. (35RT 4796.) She took the pills on June 30th. (35RT 4797.)

Appellant did not remember much of the telephone call with the Lucias on June 30th. She did not tell them about her pregnancy or the abortion. (35RT 4798.) The main reason she called the Lucias was to tell them that she had changed her telephone number. She changed her telephone number because Volk was leaving her messages, including a message on June 29th or June 30th, asking appellant to be the "best man" at his wedding to another woman. (35RT 4799-4800.) Appellant sent her landlady a check for the rent on June 30th, with a message to "Have a happy 4th." (35RT 4801-4802.) Appellant sent out the check because she expected to be living at the house for the next month. (35RT 4802.) Appellant had no income other than the child and spousal support she received from Folden. (35RT 4803.)

Appellant did not remember sending Volk a letter (Peo. Exh. 20 A, 20 B), although she acknowledged that the letter was signed by her and in her handwriting. (35RT 4805.) The letter stated, "I can't live without you in my life-" and "I have nothing left[,] you took it all" and "I can't do this anymore." (Peo. Exh. 20 B, emphasis in original.)

Appellant also did not remember writing a note to Folden stating, "Now you don't have to support any of us! Fuck you[,] you are scum! (Peo. Exh. 36 A, 36 B). However, she acknowledged that it was her handwriting on the envelope and the note. (35RT 4806.)

Appellant recalled that on the night of June 30th, she talked to Debbie Wood on the telephone while her children were in the kitchen watching a movie. (35RT 4808.) Appellant was drinking beer and a wine cooler that night. (35RT 4809.) She did not recall the specifics of the conversation with Wood. (35RT 4810.) After the conversation ended, appellant went into the kitchen and turned on the oven to get some heat because she was

feeling really chilled. Appellant laid down with her feet on the oven door while it was half open. The younger children were asleep and David stirred and turned over. Appellant did not sleep. She lay there looking at her children, realizing how big they were getting and "really enjoy[ing] them at that time." (35RT 4811.)

The next thing appellant remembered was waking up in black smoke. She told her children to lay on their stomachs and breath through the blankets so they would not breath smoke. Appellant rubbed their backs and called out to them. It was very dark in the kitchen and she could not see anything. Appellant had no idea where the fire was coming from. (35RT 4812.) Appellant did not recall starting the fire. (35RT 4817.) Appellant tried to get up. The next thing appellant recalled it was morning and the sun was starting to come up. Appellant did not recall David or her other children saying anything that night. After appellant woke up she opened the patio door and went outside to the children's pool. Appellant's hands and feet were stinging. (35RT 4813.) She went back inside the house and went to use the bathroom. Appellant did not recall seeing her children on the kitchen floor. Appellant did not recall David asking her what had happened. Appellant called 911 and waited until the paramedics arrived at her door. (35RT 4814.) Appellant did not remember calling Volk and telling him there had been a fire. (35RT 4814-4815.) Appellant recalled sitting on the lawn, the paramedics strapping her on the gurney and putting an oxygen mask on her face. (35RT 4815.) Appellant remembered the paramedics telling her that her children were dead. The news upset appellant. (35RT 4816.)

Dr. Lorie Humphrey, a licensed clinical psychologist specializing in neuropsychology, interviewed and tested appellant in jail over a four-day period in December 1999. (37RT 5122-5124, 5127, 5140.) "Neuropsychology" is the study of how changes in the brain impact

behavior. A neuropsychologist measures brain functioning to assess if there is any brain damage. (37RT 5129.) Dr. Humphrey examined appellant to see whether her behavior on the night of the fire might be due to brain damage. (37RT 5131.) Dr. Humphrey administered standardized tests to appellant using standardized procedures, and compared the results to normative data involving persons of the same age and educational background. (37RT 5138-5139.) Dr. Humphrey interviewed Al Lucia and appellant's aunt Frey, and she reviewed police records and prior assessments. (37RT 5141.) Dr. Humphrey also read letters appellant had written and statements attributed to David. Dr. Humphrey also received information about appellant's mother. (37RT 5142.)

Appellant had several risk factors in her early history, including being hit hard in the head several times a day by her mother, beginning from ages 12 to 18 months. (37RT 5143-5144.) Beginning at about 18 months, appellant began exhibiting behaviors that included rolling the eyes, falling on the floor, and full body shaking. Al Lucia told Dr. Humphrey about the incident in the high chair. (37RT 5145.) Dr. Humphrey also learned of another seizure that appellant suffered at about the age of two, where she was taken to a hospital and underwent testing. (37RT 5146.) Appellant's behavior was consistent with epilepsy. (37RT 5147.) Appellant's subsequent behavior after hospitalization -- fainting from time to time even with medication -- was consistent with a brain malfunction. (37RT 5148.)

Dr. Humphrey believed that appellant was giving her best effort during testing and that the test results were valid. (37RT 5156-5158.) Appellant took tests designed to detect malingering, and her scores on the tests indicated she was not malingering. (37RT 5162-5164.)

Dr. Humphrey described appellant's neuropsychological profile as "in the average range," for the most part. (37RT 5167.) Appellant's I.Q. was "in the average range." (37RT 5168.) Appellant graduated from high

school, although she was at a 7th grade level in math and writing. Appellant could not do division and she had trouble sitting at a computer and doing a boring task. (37RT 5169.) Appellant had trouble paying attention and showed impulsivity. Appellant did well on a number of tests of executive functioning related to the frontal lobes, but she had difficulty on tasks related to specific areas of the frontal lobes, especially around the orbital frontal region. (37RT 5170.) Appellant was both depressed and anxious, but she did not appear to be unduly so. (37RT 5181.) Appellant's responses to the Stroop test indicated a problem with her orbital frontal region. (37RT 5186.) Appellant had difficulties with selective aspects of problem solving. (37RT 5187.) Appellant had trouble stopping herself when she got an idea, and trouble coming up with alternate solutions to a problem. (37RT 5189.)

Dr. Humphrey opined that appellant had brain damage to her orbital frontal region of her brain. Appellant's language memory was consistently impacted. (37RT 5198.) The descriptions of head trauma testified to by Al Lucia would be consistent with causing the brain damage that Dr. Humphrey observed. (37RT 5203.)

Dr. Philip Ney, a psychiatrist, performed a "mental examination" of appellant on two occasions. Dr. Ney also read trial transcripts, police reports, and reports by Dr. Humphrey and Dr. Boyd. (40RT 5739, 5744-5745.) Dr. Ney gave appellant a "pregnancy loss survivor questionnaire." (40RT 5745.) Dr. Ney used the questionnaire to determine the effects of both mistreatment in childhood and the effects of a pregnancy loss or "pregnancy outcome." The sudden cessation of hormones when a woman has an abortion is responsible for "post-abortion depression." (43RT 6265.) Some women relieve their depression with "frenetic activity," alcohol, or drugs. "Post-abortion syndrome" is a compilation of guilt, depression, fear, and anger. (43RT 6266.) Dr. Ney opined that appellant was "in the

extreme range, almost everything. The exception being, interestingly enough, on sexual abuse." (40RT 5746.) Dr. Ney opined that appellant had a history of epilepsy. (40RT 5757.) Dr. Ney further opined that appellant had "significant postpartum hormonal effect from the abortion five days before the fire." (40RT 5757-5758.)

Dr. Ney interviewed appellant twice, including "last Sunday," for purposes of "refin[ing] my diagnosis." Dr. Ney did not find anything new. Dr. Ney did not take notes at this second interview. (42RT 6025.) Dr. Ney evaluated appellant for malingering and concluded she was not intelligent enough to do a "good job at that." (42RT 6028.)

Dr. Ney testified that on the night of the fire, appellant heard a "loud roaring" which was an "epileptic aura." Appellant then passed out. (43RT 6270.) Appellant's use of the oven that night to warm herself was consistent with someone who has "serotonin syndrome because of a combination of drugs" such as Zoloft and Phentermine." (43RT 6278-6279.) Phentermine had been withdrawn from the market because of its toxicity. (43RT 6367.) The combination of Zoloft and Phentermine can affect some people but not other people. (43RT 6367-6368.)

Dr. Ney ruled out malingering in appellant's case because, among other reasons, "you cannot invent the aura of a[n] epilepsy.... Nor can you invent the symptoms that go along with serotonin syndrome." (43RT 6267.) The symptoms of serotonin syndrome included confusion, delirium and "chills." (43RT 6381-6382.)[9]

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[9] "Serotonin syndrome" is a "rare condition when people who are on serotonin drugs, or drugs that increase serotonin levels in the brain ... if they are on two or more of those drugs" risk having a collection of symptoms referred to in medicine as "serotonin syndrome." (48RT 7413 [testimony of Dr. Amos].)

Further, appellant's I.Q. was 93, while the average American high school graduate has an I.Q. of 115. Appellant's I.Q. was well below the average American high school graduate. Dr. Ney opined that appellant had been brain damaged as a result of carbon monoxide poisoning. (43RT 6268-6269.)

Dr. Ney did not find it of "great importance" that appellant did not have a prior recorded history of dissociative disorder, because "none of the precipitating conditions existed prior to this." (43RT 6279-6280.) A person experiencing a psychological dissociative state "can do very, very complex things." If a person is experiencing an "organically" determined dissociative state "set off by seizures," then that person will be "clumsy" and not aware of what he or she is doing. (43RT 6282.)

Appellant's history and symptoms fit the diagnosis of major depression, postpartum depression, dissociative state, and serotonin syndrome. (43RT 6370.)

C. Rebuttal

Dr. Robert Brook, a clinical psychologist with a specialty in neuropsychology, made a request to the trial court to personally evaluate appellant. Dr. Brook was not able to personally evaluate appellant, however, because she refused. Dr. Brook indirectly evaluated appellant by looking at records supplied by Dr. Hirsch, Dr. Humphrey, and appellant's school records and prior psychological evaluations. Dr. Brook also sat through appellant's testimony. (38RT 5369-5370, 5375-5377.) Dr. Brook did not agree with Dr. Humphrey's conclusions regarding appellant's alleged cognitive impairment. (38RT 5377.) Some of Dr. Humphrey's test results reflected "true ability" but some test results reflected "less than full ability." (38RT 5378.)

Some of appellant's scores on tests that measured memory were "in a very suspicious range." (38RT 5383.) There were "contradictions"

between appellant's poor performance on simple memory tests and her high level of functioning on more complex tests that assumed a reasonable intact memory. Additionally, there were inaccuracies in Dr. Humphrey's raw data. (38RT 5387.) Dr. Brook noted mistakes and inaccuracies throughout Dr. Humphrey's data. (38RT 5388.) Dr. Brook reviewed responses from a 1999 MMPI-2 test given to appellant and detected a "lack of authenticity" that made the test "invalid." Dr. Brook also reviewed results from an MMPI-2 test that appellant had completed "a year or so earlier," in a context that indicated appellant wanted to "look good." The result was that the test was "invalid." (38RT 5392.) Dr. Brook opined that appellant had "skewed" the results, depending on what she hoped to achieve. (38RT 5393.)

Appellant's 1999 MMPI-2 profile represented someone with a "very severe psychopathology, most likely a psychotic condition" or a "very deep and severe depression that has psychotic elements to it." (38RT 5394.) It is generally readily apparent from a person's behavior whether he or she is psychotic. (38RT 5395.) Dr. Brook was not surprised by Dr. Humphrey's testimony that she found no evidence of psychosis during her interview of appellant. Dr. Brook was also not surprised by Dr. Ney's finding that there was no evidence that appellant was psychotic. Dr. Brook concluded that appellant's 1999 MMPI-2 results were due to "malingering, or impression management." (38RT 5396.)

Dr. Brook's conclusion that appellant was engaging in "impression management" was reinforced by review of the police records, which indicated that appellant signed Fernando Nieves' name to the rental agreement to the Santa Clarita house. This was significant because it showed a "real life" example of appellant doing what needed to be done to achieve a goal, regardless of the truthfulness or ethics of the behavior.

(38RT 5397-5398.) In other words, appellant was willing to engage in fabrications to reach a particular goal. (38RT 5398.)

Dr. Brook reviewed appellant's school records. Appellant's high school grades were mostly As and Bs. (38RT 5400, 5404.) These grades were inconsistent with a person having an impaired memory as indicated by appellant's recent memory tests. (38RT 5401.) Dr. Brook opined that appellant had a "normal, functioning memory." (38RT 5405.) Dr. Brook did not see any indications that appellant could not engage in goal significant behavior. (38RT 5406.)

Dr. Brook examined appellant's jail records and was not surprised that there were no indications that she had manifested any psychotic symptoms or been prescribed anti-psychotic medications around the time that appellant was administered the MMPI-2 in December 1999. Dr. Brook opined that appellant's cognitive processes were well within normal limits. (38RT 5414.) In fact, a person could have some amount of "brain damage" and still have no cognitive dysfunction. A finding of brain damage would be inconsistent with appellant's 1997 MMPI-2 test administered by Dr. Suiter. (38RT 5415.) Dr. Brook concluded, based on the documents he reviewed, that appellant attempted to appear impaired. (38RT 5424.)

Dr. Brook disagreed "quite strongly" with Dr. Humphrey's conclusions, based on the color trails tests, that appellant had problems in "divided attention." Dr. Brook concluded that appellant had "good ability for divided attention." The test manufacturer and the distributor of the color trails test had not published any new norms that rendered the prior manual outdated. (38RT 5408.) Dr. Brook contacted the manufacturer of the test and the distributor of the test and was informed that the norms published in the manual were the current norms. Those were the norms to be used and there were no revisions "in the works." Dr. Brook strongly advised against anyone in his profession using unpublished norms in a

criminal case. (38RT 5409.) Dr. Brook spoke with Dr. Paul Satz regarding Dr. Humphrey's claim that the norms for the color trails test in the manual should not be used, and that there were more current norms to be used. (40RT 5709.) Dr. Satz told Dr. Brook that the norms in the color trails manual were not outdated and that the norms in the color trails manual should be used; there were no new norms that should be used in place of the norms that were in the manual. (40RT 5710-5711.) Further, Dr. Satz stated that he did not give Dr. Humphrey new norms to use and tell her to use them in place of the manual norms. Dr. Satz agreed with Dr. Brook that the way the color trails test should be scored is as directed in the manual. (40RT 5711.) Based on all of the neuropsychological testing done by Dr. Humphrey, the results indicated that appellant was malingering, rather than suffering from organic brain damage. Dr. Brook's opinion was based on the many inconsistencies and contradictions in the data. (40RT 5714-5716.) There were no indications that appellant suffered from any type of brain injury causing cognitive dysfunction. (40RT 5721-5722.)

Dr. Robert Chang performed a medical examination of appellant on July 7, 1998, at County USC Hospital. (43RT 6316.) Dr. Chang questioned appellant about her medical history. Appellant stated she had no prior history of depression within the past few weeks or months. Appellant did not have any problems with insomnia, appetite or energy level. (43RT 6317, 6349.) Appellant denied lacking "zest for life." (43RT 6317-6318.) Appellant denied a history of seizures. (43RT 6350.) Appellant did not have a lot of guilty thoughts or problems with concentration. She denied having any crying spells. Dr. Chang asked appellant if she had attempted suicide before and she said no. (43RT 6318.) Appellant stated she was currently taking Doxycycline and in the past had been taking 50 milligrams of Zoloft daily from May to June of 1995. The average dose for Zoloft is 150 milligrams a day. Appellant

stated the Zoloft helped her. She did not say anything about having taken Zoloft the previous week. Appellant further stated she had received marriage counseling three times in September of 1995. (43RT 6319-6320, 6322.)

Dr. Chang also conducted a mental status examination of appellant. Appellant was well-groomed, cooperative and made good eye contact. She coughed periodically and was tearful at times. Her thought processes were rational and normal. She had no suicidal ideation. (43RT 6320.) Dr. Chang administered a "mini-mental status exam" on appellant. Appellant scored 29 out of 30 points, missing one recall. Appellant appeared to understand the questions and answered them appropriately. (43RT 6320-6321.) Appellant was tearful about not being able to see her daughters one more time and about not being able to get a job with the LAPD. (43RT 6321.) Dr. Chang thought it was unusual for appellant to be tearful about not being able to get a job with the LAPD, considering she had just lost her children. (43RT 6321-6322.) Dr. Chang recommended that appellant not receive any anti-depressant medication, because she was not depressed. (43RT 6322.)

On cross-examination, Dr. Chang testified that appellant told him that her mother had "many romantic relationships" and that appellant had been sexually assaulted by one of her mother's boyfriends. Appellant also stated that her mother was physically and emotionally abusive towards her. (43RT 6336.) Dr. Chang did not believe that appellant was malingering; she was cooperative and answered questions directly. (43RT 6337.)

Dr. John Dehaan, a criminalist who specializes in the investigation and reconstruction of fires and explosions, testified that the fire in the instant case was a "typical" arson of a residence, where gasoline was poured on a carpet and ignited in an effort to destroy the structure. Most arson fires involve setting a carpet on fire. The pour pattern in the instant

case "indicates an intent to destroy the house by setting fire to it." (44RT 6473, 6481-6482.) Contrary to Del Winter's testimony, there are scientific tests available to determine the amount of gasoline used to start a fire. (44RT 6482-6483.) Dr. Dehaan conducted just such a test, and determined that one and one third to one and one half gallons of gasoline would account for the damage to appellant's house. (44RT 6483-6485.) Dr. Dehaan's estimate was "conservative." The actual amount of gasoline used could have been even greater. (44RT 6494.) A person would not necessarily get burned setting such a fire, or even experience redness on the hands. (44RT 6499.) However, the fact that appellant experienced singed nose hairs was consistent with fire-setting activity and being close to a fuel source at the point of ignition. (44RT 6500.) Dr. Dehaan did a test using the pint or so of liquid that Del Winter's had offered as his opinion of the amount of gasoline used. Based on his test, Dr. Dehaan opined that such an amount was too small based on the burn patterns in the carpet. (44RT 6494-6495.) Most arsonists do not think about proper ventilation for a fire. (44RT 6502.) Dr. Dehaan opined that, based on the quantity of gasoline poured and where the gasoline was poured, the fire here was intentionally set with the intent to destroy the house. (44RT 6503-6504.)

Dr. Alex Caldwell, a clinical psychologist primarily employed by a company he owns called "Caldwell Reports," testified as an expert on the MMPI-2 test. The MMPI is a personality test or personality inventory, with 567 statements that one answers as "true" or "false." (44RT 6579.) Dr. Caldwell developed a computer program that generates reports based on MMPI-2 response scores. The narrative reports "essentially predict the likely behavior of the person who took the test." (44RT 6584, 6587.) Dr. Caldwell's company scored the 1999 MMPI-2 that was administered by defense expert, Dr. Kaser-Boyd, to appellant in December 1999. Dr. Caldwell issued a report in February 2000. (44RT 6589.) Dr. Caldwell

reviewed the report of the profile generated from appellant's MMPI-2 responses. (44RT 6590.) Dr. Caldwell opined that appellant "clearly did set out to try to look bad on the test." (44RT 6593.) That is, based on appellant's responses, she was either "floridly psychotic" or "grossly exaggerating." (44RT 6594.) If someone were that psychotic, it would be noticeable to "most anybody." (44RT 6596.) Dr. Caldwell was asked a hypothetical based on appellant's "lucid, coherent, organized, and responsive" testimony. Dr. Caldwell opined that such testimony would be "inconsistent" with a profile of "overt psychosis" and "consistent" with "malingering or faking bad." (44RT 6596.) Dr. Caldwell was presented with a hypothetical question based on the facts surrounding the instant crime. Dr. Caldwell opined that the profile obtained was consistent with someone who deliberately set the fire after writing an angry suicide note. (44RT 6598-6599.)

Dr. Caldwell also rescored an MMPI-2 test that was administered to appellant in July 1997 by Dr. Suiter in the midst of a custody battle between appellant and her ex-husband, Dave Folden. Dr. Suiter found that appellant was "malingering" by "faking good," that is, trying to represent herself in the most favorable light. Based on his rescoring of the MMPI-2, Dr. Caldwell agreed with Dr. Suiter that appellant was trying to "look as healthy as possible" in the context of a custody dispute. (44RT 6600-6602.)

Dr. Diana Barrows performed the abortion on appellant on June 25, 1998. (46RT 6864-6865.) Appellant filled out a health questionnaire while waiting for Medi-Cal to approve the abortion. Appellant waited about three hours. (46RT 6865-6866.) Under the health history section of the questionnaire, appellant indicated she had no history of seizures, epilepsy, blackouts, or fainting. Appellant indicated that she was not taking any drugs or medications. If appellant had been upset, crying, or hysterical

while at the abortion clinic, Dr. Barrows would have written it down in the records. There was no mention in the records of appellant being upset, crying, or hysterical. (46RT 6866-6867.) Appellant also did not hyperventilate during the abortion or mention that her lips were numb. (46RT 6868-6869.) After the abortion, appellant was not "put into a corner to recover because she was crying, upset, and hysterical." The clinic did not "have a corner to put somebody in." (46RT 6869.) Appellant indicated that she was sure about her decision to have the abortion. (46RT 6869-6870.)

Fernando Nieves testified that he could not recall appellant ever telling him that she had been emotionally abused by her mother. (46RT 6913.) Appellant never told Fernando that she had fainted as a child, or had epileptic seizures. Appellant never told Fernando that she walked in her sleep, and Fernando never observed her sleepwalking during the four years they were married. Appellant never told Fernando that she heard voices or strange noises. (46RT 6913-6914.) Appellant never mentioned any tingling sensations in her neck, spine, or the back of her head. She never mentioned constricted vision or "fuzzy hearing." She did not mention tingling or numbness in her extremities. Fernando never saw appellant get a "glazed-over look on her face." (46RT 6915.) Appellant spent a lot of time on the computer. Her online name was "clever gal." (46RT 6918-6919.)

Appellant called Fernando on the morning of June 25, 1998. Appellant told Fernando she was going to get an abortion. They talked for 15 or 20 minutes and appellant was not hysterical or crying uncontrollably during that time. (46RT 6922.)

Detective Taylor spoke with appellant at Henry Mayo Hospital on July 1, 1998. Appellant told Taylor she was fine with her decision to have an abortion and was "dealing with it." (46RT 6949.) When Taylor went to

appellant's house, he found some cards with pager codes on them. The cards were recovered from the headboard of the waterbed in the converted bedroom belonging to appellant. (46RT 6949.) One of the pager codes used the phrase "fuck you." (46RT 6950.)

Detective Taylor spoke with Debbie Wood on July 2, when she told him that appellant had moved her family to the Santa Clarita Valley to be closer to Scott Volk. Wood stated that appellant's children were not allowed to use or answer the telephone unless appellant was away. Appellant instructed her children to answer the telephone when she was away only when she called. All the other calls were to be answered by the answering machine when appellant was away, other than calls made by appellant to her family. Wood further told Taylor that to use appellant's telephone one would have to use a numeric code to be able to make an outside call. (46RT 6946.) Appellant did not let her children have the code for the telephone. When appellant went out in the evening, leaving the children at home, the security system would be on and the children did not know how to disable it. Wood did not know why appellant did not take her children to the Del Mar Fair on June 29, 1998. On June 30, 1998, appellant told Wood during a telephone conversation, "I don't give a fuck anymore. I am just going to sit here and drink. I have a date with Bud." (46RT 6947.)

In a meeting with Debbie Wood on July 11, Wood told Detective Taylor that Dave Folden had joined her church two years before and still sometimes attended. (46RT 6947.) Wood further stated that appellant had stopped going to church about the time of her divorce from Folden. (46RT 6947-6948.)

Dr. Robert Sadoff, a psychiatrist, was appointed as an expert to assist the prosecution. However, appellant refused to be examined by Dr. Sadoff. (47RT 7058, 7066-7067.) In lieu of a personal examination, Dr. Sadoff

reviewed many of the documents and reports generated in this case regarding the crimes. Dr. Sadoff had examined over 300 patients suffering from dissociative states. (47RT 7067.) "Dissociation" ranges from normal daydreaming to five categories of abnormal dissociation, beginning with pathological amnesia or "dissociative amnesia." (47RT 7068-7070.) There is also "dissociative depersonalization," which is a defense mechanism to keep a person from feeling painful emotions. (47RT 7071.) The three other categories of abnormal dissociation are dissociative identity disorder ("multiple personalities" a la Three Faces of Eve), "fugue state," and "dissociative disorder, not otherwise specified." (47RT 7071-7072.) In Dr. Sadoff's opinion, appellant did not fit any of the five pathological categories of dissociative disorders. (47RT 7073.) Moreover, a person can claim "amnesia," but not really have a loss of memory: in criminal cases, a person may not want to talk about the crime because it would be incriminating. (47RT 7075-7076.) Amnesia is consistent with "malingering" or "faking." (47RT 7076.) Dr. Sadoff reviewed a transcript of appellant's testimony. Her testimony was not consistent with amnesia or dissociation, because she remembered too much, her memory was selective, and she made inconsistent statements from one examiner to another. (47RT 7077-7078.) Additionally, dissociation does not cause a person to kill. According to Dr. Sadoff, "[p]eople claim dissociation a lot, but very few have it." It is common in criminal cases for the defendant to claim he or she was in a dissociative state at the time of the crimes. (47RT 7081-7082.) Dr. Sadoff was given a hypothetical question based on the facts of this case. (47RT 7082-7084.) Dr. Sadoff opined that the defendant's behavior in that hypothetical was "goal-directed, intentional, and purposeful." (47RT 7084.) That type of behavior is inconsistent with a person being unconscious or in a dissociative state. (47RT 7085.)

Dr. Edwin Amos, a neurologist, was appointed by the court to assist the prosecution by reviewing appellant's medical records and possibly to examine appellant. However, appellant refused to be examined by Dr. Amos. In lieu of an examination, Dr. Amos reviewed many medical records and documents concerning appellant. (48RT 7269-7273.) Dr. Amos testified that seizures are not uncommon in children and most children "grow out of it." (48RT 7276.) The fact that a child has a seizure at 18 months to two years of age is not necessarily indicative of epilepsy at a later age. (48RT 7277.) Additionally, a child may pass out because of a breath-holding episode, migraine headache, dehydration, or spinning around. (48RT 7278.) A diagnosis of epilepsy requires a clinical history "beyond any kind of doubt" of recurring seizures, as well as a brain wave study. (48RT 7278-7279.)

Based on an analysis of appellant's medical records, Dr. Amos opined that appellant did not have "any significant brain problem." Further, appellant's vital signs were normal at the Henry Mayo Hospital, which would be "very inconsistent with someone having suffered a bout of recurrent seizures without regaining consciousness." (48RT 7284.) Additionally, a person who had a history of recurrent seizures or epilepsy could not perform at appellant's level on neurological tests. There was nothing in appellant's test results that was consistent with a history of seizure disorder. A person is unable to have goal-directed, purposeful, intentional behavior during a seizure. (48RT 7285.) Dr. Amos reviewed an EEG performed on appellant; the results were "normal," which would be inconsistent with epilepsy or a seizure disorder. (48RT 7291-7292.) There was no indication in appellant's jail medical records that she had a seizure disorder. (48RT 7297.) Dr. Amos believed appellant suffered from migraines, not epilepsy. (48RT 7307-7308.) Just as a person who is epileptic may have an "aura" before a seizure, a person suffering from

migraines may experience an "aura" before the onset of the migraine. (48RT 7312.) Dr. Ney's description of appellant experiencing a tingling sensation in her neck, constructed vision, and fuzzy hearing, were classic symptoms of an aura preceding a migraine. (48RT 7312-7313.) One common treatment for a migraine headache is to lay down and sleep. (48RT 7313.) Dr. Amos was posed a hypothetical question based on the facts of the case. He opined that such behavior "strongly suggests goal-directed behavior and not automatism," or unconscious behavior. (48RT 7318.) Dr. Amos was 100% medically certain that appellant did not have epilepsy. (48RT 7318-7319.)

Dr. Amos was also 100% certain that appellant did not have any significant brain injury causing cognitive dysfunction. (48RT 7322.) Serotonin syndrome is "uncommon" and does not cause a loss of impulse control or homicidal behavior. It might cause seizures, but that would be "a rare occurrence." (48RT 7327.) Dr. Amos was 100% certain that appellant did not suffer from serotonin syndrome on July 1, 1998. There was no connection between serotonin syndrome and homicidal behavior. (48RT 7337.) Dr. Amos had never heard of an abortion causing a woman to go into a neurologically-induced dissociative state. Even combining the hormonal changes caused by abortion with alcohol, and Zoloft, a person would not be prevented from goal-directed, purposeful behavior. (48RT 7339.) Based on his review of the medical records, there was no indication that appellant experienced a neurologically induced dissociation on July 1, 1998. (48RT 7340-7341.) Appellant's claim of being in a dissociative state was consistent with malingering. (48RT 7341.) Dr. Amos was completely certain that appellant did not suffer from an organic brain disorder on July 1, 1998. (48RT 7342.)

Dr. Scott Phillips, a medical toxicologist, testified that toxicology is the "science that deals with the really adverse effect of substances or

chemicals ... on people." (49RT 7453-7454, 7458.) Dr. Phillips was familiar with the drug Zoloft, which is a common antidepressant. Zoloft increases the levels of serotonin in the brain, and in so doing "alleviates a lot of the symptoms of depression." (49RT 7459.) Dr. Phillips was also familiar with Phentermine, "an amphetamine-like drug used mostly for weight loss." (49RT 7460.) Phentermine does not have any effect on serotonin in the brain. Phentermine is still available in the United States and is widely prescribed. Phentermine and Zoloft are commonly used together. (49RT 7461.) Serotonin syndrome is a "very rare syndrome." (49RT 7462.) Serotonin syndrome does not cause homicidal or suicidal behavior. (49RT 7462-7463.) There is absolutely no evidence in the medical records that appellant suffered from serotonin syndrome. The records from Henry Mayo Hospital indicated that appellant was alert and oriented. (49RT 7464.) Dr. Phillips disagreed with Dr. Ney's conclusion that Zoloft mixed with Phentermine could cause serotonin syndrome. There is no medical literature to support Dr. Ney's conclusion. (49RT 7470-7471.) There is no medical literature to support the conclusion that dissociation can be caused by Zoloft and/or Phentermine. (49RT 7472.) Dr. Phillips was presented with a hypothetical based on the facts of the case. (49RT 7472-7475.) Dr. Phillips opined that the behaviors in the hypothetical were "goal-oriented, very specific, task-oriented" and not consistent with a person who is unconscious or delusional or experiencing serotonin syndrome. (49RT 7475-7476.) Dr. Phillips had never heard of a person who could control a grand mal seizure by lying down. (49RT 7477.) Dr. Phillips attributed the elevated level of CPK in appellant's blood to carbon monoxide. (49RT 7480.)[10] An elevated level of CPK does

[10] "CPK" is an enzyme that is found in large quantities in muscle tissue throughout the body. This enzyme is released from the tissue into the (continued...)

not indicate a seizure. (49RT 7481.) There was no evidence that appellant had severe carbon monoxide poisoning; Dr. Phillips opined that appellant had mild carbon monoxide poisoning. (49RT 7482.)

D. Surrebuttal

Dr. Gordon Plotkin, a forensic psychiatrist, reviewed documents that included the testimony of Dr. Ney and Al Lucia, and reports from Dr. Ney and Dr. Sadoff. (48RT 7376-7380.) Dr. Plotkin opined that Al Lucia's description of appellant's symptoms when she was 18 months to two years was consistent with a diagnosis of "seizures," which is a more specific term than "epilepsy." (48RT 7381, 7390-7391.) Lucia's description of appellant shaking uncontrollably one afternoon and going to the hospital was also consistent with a diagnosis of "seizures." (48RT 7392.)

Dr. Plotkin stated that blood drawn from appellant at Henry Mayo Hospital showed a "dramatically elevated" level of an enzyme ("CPK") that is associated with seizures. (48RT 7425-7426.) The level of CPK found in appellant's blood was "very suggestive" of her having had a seizure recently around the time of the blood being drawn on July 2, 1998. (48RT 7428.) Further, a person who was in a carbon monoxide atmosphere where four people died could suffer from delirium and make "poor choices." (48RT 7429.) Dr. Plotkin further opined that appellant likely had a carbon monoxide level of between 16 and 32 per cent at the time that she was rescued. (48RT 7432.) A person with carbon monoxide levels between 10 and 30 per cent would experience mental status changes including "flat demeanor." (48RT 7433.) Another effect of carbon monoxide poisoning is lack of recall or amnesia. (52RT 7847-7848.)

(...continued)
bloodstream when a person has a seizure or other trauma. (48RT 7426.)

A sensation coming from the back of one's neck, muting the hearing and constricting one's vision, and the person then passing out would be consistent with an aura leading to a seizure. (52RT 7825.) Symptoms such as tingling in the mouth and limbs and "fuzziness" in the head would be more likely to be hyperventilation and not an aura. (52RT 7825-7826.)

Dr. Plotkin described a "dissociative state" as generally a psychological condition brought on by stress, expressing itself through amnesia or a person believing he or she is someone else. (52RT 7828.)

A combination of Zoloft and Phentermine can lower a person's threshold for having a seizure and can cause serotonin syndrome. (52RT 7838, 7867.) Serotonin syndrome is a "dose-related syndrome." (52RT 7841.) There is no specific amount of drugs needed to cause serotonin syndrome in any given individual. It depends on the individual. (52RT 7843.) Delirium is a symptom of serotonin syndrome. If a person were in such a delirium, he or she would have a "shoddy memory for that period of time." During that period of time, a person could not plan complex actions, but might be able to do actions that appear complex, such as tearing off bandages and trying to get out of a hospital bed. (52RT 7835-7836.) It is "not inconceivable" that somebody in such a state of mind could light a fire. (52RT 7837-7838)

If a person had serotonin syndrome 12 to 15 hours before going to a hospital, Dr. Plotkin would not necessarily expect to find any signs of that syndrome if that syndrome had passed. (52RT 7880.)

E. Sur-Surrebuttal

Dr. Edwin Amos testified that neurology is a different field than psychiatry. A neurologist deals with neurological problems like epilepsy, while a psychiatrist deals with psychiatric disorders like depression. (54RT 8275.) There is some overlap between the two fields. (54RT 8276.) Dr. Amos was a chief resident in the field of neurology and treated patients

with seizure disorders "every day." (54RT 8277-8278.) Dr. Amos examined appellant's jail records, which made it clear that appellant never had seizures. (54RT 8279.) Dr. Amos based his opinion on appellant's statements to Dr. Dicarlo on July 15, 1998, when she denied a history of seizures but did state she had a history of fainting. (54RT 8280.) Appellant repeatedly denied a history of seizures. (54RT 8281.) Then, on July 3, 2000, appellant changed her story and told Dr. Dicarlo that she had a history of seizures since childhood and the last seizure was in July 1998, referring to the incident when she fainted in the shower. (54RT 8281-8282.) Dr. Amos opined that appellant's elevated CPK levels, which were detected at the hospital, were due to the carbon monoxide and not a seizure. (54RT 8292.) Dr. Amos further opined that Dr. Plotkin was being misleading to mention seizures as a possible cause of elevated CPK levels, without mentioning that it is nonspecific to any given medical diagnosis. (54RT 8294.) Dr. Amos agreed with Dr. Plotkin that in this case there was no evidence of delirium or dissociation at any point with respect to appellant on June 30th or July 1, 1998. (54RT 8296.)

F. Penalty Phase -- Prosecution

Minerva Serna, the mother of Fernando Nieves and the grandmother of David, Nikolet, and Rashel Nieves, testified about the impact on her of the death of her granddaughters and the attempted murder of her grandson. (60RT 9297.) Serna also knew Jaqlene and Kristl and loved them all very much. The children "meant more than anything in the world" to Serna, even though she could not see them often because appellant prohibited it. Serna would miss her grandchildren, she would miss out on their smiles and laughter. (60RT 9298.) Serna found out at the hospital that her granddaughters were dead and it felt like a knife tearing out her heart. (60RT 9299.) She last saw the children on June 28, David's birthday, when they went to put a stone on her husband's grave. (60RT 9299-9300.) Serna

suffers every day because of the deaths of her granddaughters. (60RT 9300-9301.) The four girls died a "miserable death that lasted for hours and hours and hours." (60RT 9307.)

Fernando Nieves described how he came home from work on July 1, and viewed a television report of a fire in Santa Clarita that might have killed some children. Fernando looked at his wife, Charlotte, and said to her that it must be a coincidence and there was "nothing to it." As the news broadcast continued, describing the area where the fire was, Fernando was "glued to the set," and then when the television showed a picture of the van parked against the house, Fernando knew that it was his children who were killed. (60RT 9317.) Fernando prayed that they were wrong, that his daughters were not dead, as he drove with his mother to the Henry Mayo Hospital emergency room. (60RT 9318.) At the hospital they heard the news that his daughters were dead. Serna became hysterical and Fernando felt like his life was over. Fernando begged and pleaded to see his son, but he was not allowed to see David until the detectives had spoken to him and his son. (60RT 9319.) Fernando was finally allowed to see David at 3:00 a.m. on July 2. Fernando remained with his son until he left the hospital. (60RT 9320.)

Fernando described seeing the four little girls in their coffins; they looked swollen and bruised and he could not recognize them. The four little girls were innocent and did not deserve to die. If appellant was suicidal, she should have just killed herself and left the girls alone. (60RT 9320.)

Fernando described the effects of the girls' deaths on David: David was depressed and lonely, because the girls had been his best friends. David did not have any other friends. David now did not like to participate in big groups. Sometime he would be fine, then something would remind him of what happened and he would become quiet and withdrawn. David

had no enthusiasm for life. (60RT 9321.) David suffered from nightmares. David would not help Fernando build a campfire and avoided fire. (60RT 9322.) David felt guilty that he did not disobey appellant and leave the house. There was always a cloud of sorrow around the Nieves family as a result of the girls' death. (60RT 9324.) When the girls died, a part of Fernando died. (60RT 9335.)

Within a month after the little girls had died, appellant served court papers on Fernando seeking to take David away from Fernando to go live with appellant's biological father in Indiana, whom David barely knew. (60RT 9364-9367; Peo. Exh. 102.)

Dave Folden testified that on July 1, 1998, he came home from work and turned on his answering machine, which had a message from the bishop at his church telling Folden he was sorry about what had happened in Santa Clarita. Folden did not know what he was talking about. He turned on the television and saw appellant coming out of the house. And then it flashed across the screen that four girls had died. (60RT 9368.) Folden paced his apartment, saying to himself "it couldn't have happened," but it was on all of the news channels. (60RT 9369.) Folden and his mother drove to Santa Clarita and talked to sheriff's deputies there. Folden found out for sure that his girls were dead. He kept hoping it was a bad dream, even to this day. The pain of losing his girls never left him. (60RT 9370.) When the girls were alive, appellant told them stories about Folden in order to alienate them from him. Folden figured that the girls would realize the truth when they got older, but all of that was now taken from him because appellant killed the girls. Appellant wanted to control and manipulate everyone around her and she was still doing it. (60RT 9371.)

Charlotte Nieves testified that she was married to Fernando and thus the stepmother of David, Nikolet and Rashel and "a friend to Kristl and Jaqlene." During the two years before their deaths, the girls had visited on

a monthly basis and eventually on a weekly basis. (60RT 9401.) Charlotte last saw the girls the weekend before they died. (60RT 9402.) When David came to live with them after the girls died, he would not leave Charlotte's sight. He sat next to Charlotte, sitting on her lap, holding her hand. Charlotte had to tuck David in at night, assuring him that nothing would happen to him, that he would wake up alive in the morning. There was a hole in David's life left by the death of his sisters. (60RT 9405.) Charlotte has seen David withdrawn and depressed. (60RT 9409.) Charlotte asked David what he would do if he could change time, and David replied "he would be there at night and make sure everybody would get out." (60RT 9412.)

The prosecution played a 13-minute video of the children. (61RT 9443; Peo. Exh. 107-A.) Charlotte testified that the video accurately depicted the girls as "energetic," "funny" and "full of life." (61RT 9444.) Charlotte's daughter, Christine, was born on July 1st, but after finding out that her half-sisters died on that day, she chose to celebrate her birthday on June 28th, the last day she saw the girls before their death. (61RT 9445.)

Charlotte described how it felt to lose a child to a natural death versus losing a child to murder. Charlotte had given birth to twins daughter nine weeks premature in 1987. While Christine survived, Jessica died at the age of three months. Charlotte was able to say good-bye to Jessica, whose medical condition had gradually deteriorated until death was "better for her." On the other hand, the four girls who died had "nothing wrong with them." (61RT 9446.)

G. Penalty Phase -- Defense

Shirley Driskell went to high school with appellant and Fernando Nieves. (61RT 9473-9474.) Driskell also knew appellant's mother, Delores. Driskell lived with appellant and Delores for about a year when she was 15, so she observed the relationship between appellant and

Delores. (61RT 9474-9475, 9478.) Delores never approved of appellant; nothing appellant did was good enough for Delores. Delores was verbally abusive and regularly called appellant a "stupid bitch." Delores criticized appellant's friends and restricted appellant from seeing her friends. (61RT 9475.) Appellant had to dress and groom herself according to Delores's standards. Delores criticized appellant's grades: even if appellant brought home a paper with an "A" grade, Delores would find something to criticize about the paper. If appellant brought home a report card with a grade of "B," Delores would scold her for not making an "A." (61RT 9476.) Delores also hit appellant in the head with her fist and pushed appellant around. (61RT 9476-9477.) Driskell saw lumps and bumps on appellant's head. (61RT 9477.) Driskell left appellant's home because of verbal and physical abuse from Delores, including an incident where Delores sat on Driskell and kicked her. (61RT 9478.)

Driskell considered appellant "like a sister" and kept in touch with appellant and her children over the years (61RT 9479.) Driskell, who had two children of her own, actually "sought lessons" from appellant on disciplining children. Appellant advised Driskell to be consistent and not to discipline her children "out of anger." Driskell considered appellant to be "a very good mother." (61RT 9473, 9480.) Appellant fed her children and kept them well-groomed. (61RT 9480-9481.) Appellant took the children to the zoo, the park, the movies and the beach. (61RT 9481-9482.) Appellant seemed loving towards her children. Driskell observed the children hugging and kissing appellant. (61RT 9482.) Driskell stayed with appellant for three weeks in 1997 and observed the children using the telephone and playing outside. (61RT 9487, 9489.) Appellant sent newsletters to Driskell regarding the children's doings. (61RT 9484.) Appellant sent Driskell a photograph from a family vacation to the Grand

Canyon. (61RT 9484-9485.) Appellant was overweight from time to time, particularly when she was very depressed. (61RT 9385.)

In the event of her death, Driskell had wanted appellant to raise her children, because appellant was the best person Driskell knew to raise her children. (61RT 9491.) Driskell considered appellant a good human being. (61RT 9493.)

Driskell identified a birthday card to appellant from Rashel (Def. Exh. VV-1), a note from Rashel to appellant saying, "I love you" (Def. Exh. VV-2), a handmade Valentine's card from Kristl to appellant (Def. Exh. VV-3), a birthday card to David signed by appellant (Def. Exh. VV-4), and Mother's Day cards from David (Def. Exh. VV-5, VV-6), a handmade Mother's Day card from Rashel to appellant (Def. Exh. VV-7), a Mother's Day card from Kristl (Def. Exh. VV-8), a card to appellant from Nikolet (Def. Exh. VV-9), and a card to appellant from Rashel (Def. Exh. VV-10). (61RT 9538-9542.) Driskell further testified that appellant's presence in her life was of value to her. (61RT 9542-9543.)

Tammy Pearce met appellant through church in 1990. Appellant had at least three children at the time and was pregnant with Kristl. (61RT 9505-9506.) Appellant attended church regularly and was also a Cub Scout troop committee chairperson. Appellant's children were always "beautifully groomed, healthy, happy." The children were very loving, polite, and affectionate." (61RT 9506.) Appellant always treated her children fairly and she was a "very good example" of a "good mother." Appellant disciplined her children "with love." Pearce never saw appellant physically abusing her children. (61RT 9507.) Appellant was in church every Sunday sitting in the front pew with her children. The children were active in the church. (61RT 9508.) Appellant and her children gave each other love and affection. (61RT 9510.)

Henry Thompson, a former sergeant in the San Diego Police reserve, had known appellant for 22 years, beginning when appellant and his daughter went to high school together. (61RT 9547-9548.) Thompson daughter is Shirley Driskell. Thompson observed that Delores kept appellant in the house as a form of discipline. (61RT 9549.) Appellant kept in touch with Thompson over the years, sending him birthday cards, Father's Day cards and Christmas cards. Appellant still sent Thompson birthday cards from jail. (61RT 9550.)

Thompson saw appellant with her children. Her children were clean and well-behaved. Appellant would do "practically anything for those children." Thompson never saw appellant strike her children. (61RT 9552.) Appellant was a very loving and caring parent. (61RT 9553.)

Lynn Taylor Jones, a bishop in the Mormon Church, became acquainted with appellant through the church around 1991. Appellant was active in the church's scouting program. (61RT 9580-9581.) Appellant was a positive influence in her church activities. Jones also became acquainted with appellant's children through church activities. Appellant and her children regularly attended Sunday services, but Dave Folden rarely attended services. (61RT 9581-9582.) Appellant's home and children were neat and clean. The children were well-mannered and got along well with appellant. Appellant lost a lot of weight from around 1991 through 1998. (61RT 9583.) Appellant had a considerate and caring nature. (61RT 9586.) The church's teachings only allowed for abortion in the case of rape, incest, or to save the life of the mother. (61RT 9586.) Appellant's children seemed to be warm and loving towards appellant, and vice versa. (61RT 9587-9588.)

Carl Hall testified that he had known and been friends with appellant since they were about 14 or 15 years old. Appellant had "been there" for Hall when he needed her and she had "been an inspiration" to Hall. Hall

also met Fernando when they were both approximately 11 years old. (62RT 9651-9652.) Hall knew appellant and Fernando after they became a couple in high school, but then he drifted away from them until around 1996. (62RT 9652.) Hall then got together with Fernando and Charlotte and their children, and appellant and her children, in Las Vegas. (62RT 9654.) Appellant always kept in touch with Hall through e-mails and letters. Appellant also sent yearly newsletters regarding her and her children. (62RT 9655.) Appellant contacted Hall when he was in Kuwait on military duty. Appellant helped Hall through that situation. (62RT 9656.) During the three years before the fire, Hall would see appellant and her children three or four times a year. Appellant had a warm and loving relationship with her children. (62RT 9656-9657.) Appellant used "timeouts" to discipline the children, rather than physical violence. She was always a caring and nurturing mother. The children were allowed to go outside and play. (62RT 9658.) Hall had seen the children in a play area right off of the kitchen. The area was strewn with pillows and toys. There was also a television and a VCR player in the area. (62RT 9659.) Appellant was not the type of person to harm to her children. (62RT 9667.) Appellant has been instrumental in helping Hall raise his children. (62RT 9668.)

Lenora Frey, appellant's aunt, testified that appellant lived next door to her until the age of eight. Frey is the sister of appellant's mother, Delores. Delores was a domineering woman who regularly "smacked" and yelled at her children. Delores would not allow the children out. (62RT 9681.) Delores was rude to the children and fed them a lot of cold hot dogs and cold cereal. Frey babysat the children a lot and would take them out in the yard. (62RT 9682.) Frey wrote and telephoned appellant after she moved away with her mother. Frey attended appellant's wedding to Fernando. Appellant had only visited Frey a couple of times with her

children, because Frey lived in Indiana and appellant lived in California. However, Frey visited appellant in California around eight or 10 times over the years. (62RT 9683.) Appellant was a very caring mother who always kept her children involved in outside activities like boy scouts and gymnastics. (62RT 9685.) Frey's son would play outside and ride bikes with appellant's son. At the house in Perris, the children would watch movies at night on the floor. (62RT 9686.) Frey considered appellant a "person of value." Frey hoped that appellant would someday be able to help other mothers "in trouble with depression and whatever." Appellant was a smart and caring woman. Frey hoped something good could come out of "all of this." (62RT 9687.)

On redirect examination, Frey testified that appellant did not deserve to be put to death or be put with hardened criminals. Appellant was not a "hard criminal." She was very depressed and needed help. (62RT 9721.)

Cindy Hall, the wife of Carl Hall, knew appellant through her husband since 1991. (62RT 9723-9724.) She considered appellant a good and caring mother who did not physically abuse her children. (62RT 9725.) Appellant's children sometimes watched television and would fall asleep on the floor in the family room. (62RT 9726-9727.)

Al Lucia testified that appellant's mother mistreated appellant, slapped her, and accused her of trying to get attention by holding her breath until she passed out. (62RT 9749-9750.)

Appellant was not like her mother when it came to raising her own children. Appellant's life was centered around her children. (62RT 9751.) Lucia considered appellant to be a loving person. (62RT 9753.)

Dr. Robert Suiter, a forensic psychologist, was appointed by a family law court to evaluate appellant, Dave Folden, and the children in 1997 for child custody purposes. Dr. Suiter initially interviewed appellant and Folden jointly, then individually. Dr. Suiter also interviewed each child

individually and also saw all five children interacting with each of the parents. (62RT 9757, 9759-9760, 9769.) The purpose of the interviews was for Dr. Suiter to make recommendations to the court regarding the custody and visitation of the five children. When Dr. Suiter began the evaluation, the only issue pertained to the visitation schedule. However, during the course of the evaluation, Folden indicated he wanted custody of the two younger girls who were his biological children. (62RT 9762.) Dr. Suiter found appellant to be reasonably open and honest regarding difficult childhood experiences, her depression, and her use of psychotropic medications. (62RT 9764.) In Dr. Suiter's opinion, appellant felt very positive about her children and loved them. Appellant wanted to continue to be the primary caretaker of her children. (62RT 9768.) Appellant had insight and judgment in regards to her children. Her opinions regarding Folden "were very strongly negative and for which there was inadequate support." (62RT 9769.) Based on psychological testing, Dr. Suiter considered appellant a "needy" and "dependent-type person." (62RT 9770.) Dr. Suiter never received any information from the children that appellant was abusive towards them, or that she was anything but a caring and loving mother. The children were polite and well-mannered. (62RT 9772.) Dr. Suiter concluded that the children should live with appellant. (62RT 9773.)

Shannon North was a childhood friend of appellant. She considered appellant her best friend and part of her family. Appellant was a good and caring person. North renewed her friendship with appellant in 1990 and got to know appellant's children. (63RT 9855.) Appellant was a good mother and her children loved her. Appellant wanted to be a police officer. (63RT 9856.) Appellant home-schooled her children. She "taught them good things." Appellant lived for her children. (63RT 9857.) The children were

involved in scouting and church activities. North valued appellant as a person; appellant was "always there" for North. (63RT 9858.)

Tricia Mulder was appellant's best friend when they lived in Perris, California. Perris was "terrible" and Mulder hated living there. She did not feel safe sending her children to school there. (63RT 9867.) Appellant helped Mulder stay in her marriage, learn to love her stepchildren, and learn to deal with her husband's ex-wife. Appellant was dedicated to her children and she taught Mulder to fight for her own children. (63RT 9868.) Appellant's children "were always beautifully dressed" and would sit in the front row at church. (63RT 9869.) Appellant taught Mulder how to bleach clothes. (63RT 9870.) Appellant would call Mulder and remind her to bring her stepson to cub scout meetings. Appellant and Mulder took their children to the lake and park. (63RT 9871.) Appellant was devoted to her children and she took the role of mother very seriously. (63RT 9873.) Mulder would ask appellant's advice on how to discipline children, and she would follow appellant's advice. (63RT 9874.)

Leila Mrotzek, the Protestant chaplain at Twin Towers Correctional Facility, testified that she counseled appellant and that appellant attended church services and Bible studies. Mrotzek saw appellant about once a week. (63RT 9884, 9886.) Appellant had completed three series of Bible correspondence courses. (63RT 9887.) Mrotzek believed appellant was sincerely religious. Appellant experienced repentance and remorse "over this tragedy that has come into her life." Appellant desired to better her life, especially in relationship to her son. (63RT 9888.) Appellant prayed for her son and asked Mrotzek to pray for her son. (63RT 9889.)

H. Penalty Phase -- Rebuttal

The parties stipulated that if called as a witness, Tina Katz would testify that in a telephone conversation with Lenora Frey on October 6, 1998, Frey told her that appellant was not a "lovey-dovey" mother, and she

did not recall the children hanging on appellant or sitting on appellant's lap. (63RT 9902.) Frey further stated that the children respected appellant but were "somewhat afraid of her and knew not to cross her." Frey did not feel that appellant was loving towards her children. Appellant was raising her children the way she was raised. Frey admitted that appellant was not the best mother. Appellant was "very domineering, like her mother." (63RT 9903.)

Fernando Nieves testified that he recognized a letter from Rashel, written to appellant. In the letter, Rashel stated that she was running away from home because appellant had been ignoring her. Rashel signed the letter, "Your unloved daughter." (63RT 9926-9927; Peo. Exh. 108.)

Elaine Hoggan was the principal at Palms Elementary School in Perris. Hoggan was acquainted with Kristl, Jaqlene, Nikolet, and Rashel, all of whom were students at that school. Hoggan had contact with appellant several times over a two year period. Appellant was "extraordinarily interested in her children, much like a hawk is interested in a chicken. Very controlling. Very intelligent." (63RT 9933-9934.)

Marilyn Boyd taught first grade to David and Kristl at Palms Elementary School. (63RT 9941.) Boyd described appellant as "overbearing" and "hovering," but she "cared about her children." (63RT 9944.) When Kristl was six years old, appellant punished her for lying at home by not allowing her to go on a school field trip. (63RT 9944-9946.) Appellant was manipulative with the children. Appellant took the children out of school without telling them they were not going back, because their father was causing her problems. (63RT 9946.) Appellant was very controlling and "abrasive" with the staff. (63RT 9947.)

Phillip Rogers knew appellant and her children, having lived across the street from them in Perris for several years. (63RT 9976-9977.) Appellant was a caring mother but he did not see a "great deal of touching

[or] affection" from appellant towards her children. (63RT 9978.) Appellant was "very much involved in her own life and her own concerns." (63RT 9979.) Appellant was an overprotective mother who limited her children's freedom. Appellant was concerned about allowing the children to play in the neighborhood, but she did take them to the park. (63RT 9979-9980.) Rogers opined that appellant told lies and exaggerated, especially regarding Dave Folden. (63RT 9981.) Rogers became concerned when appellant told him that she planned to take the children and go to Indiana without Folden's knowledge. Rogers observed appellant attempting to manipulate the children to turn them against Folden. (63RT 9983.) David told Rogers that appellant told him he should hate Folden. (63RT 9985.) Appellant tried to limit and restrict Folden's visits to the children. (63RT 9988.)

Patricia Rogers, the wife of Phillip Rogers, was very close to appellant's daughters and at one point was very close to appellant. (64RT 10010-10011.) Mrs. Rogers would not describe appellant as a kind, caring, loving, warm, mother. (64RT 10012.) At first, Mrs. Rogers considered appellant as an overprotective mother, but as the children got older, she realized that appellant was controlling and "very manipulative with her children." (64RT 10012-10013.) Appellant very seldom displayed affection towards her children. (64RT 10013.) Appellant was very strict about allowing Dave Folden to only see the children during his scheduled visitations and then only during the specified hours. (64RT 10018-10019.) Mrs. Rogers denied babysitting appellant's children while appellant went at night to a police academy in San Diego. Mrs. Rogers offered to babysit while appellant went to school, but appellant stated that she wanted the children at their own house. (64RT 10025.) Appellant never mentioned to Mrs. Rogers that she had a history of seizures, blackouts, or fainting spells. Appellant would speak badly about Dave Folden in front of the children.

(64RT 10026.) As the children got older, appellant became more controlling. (64RT 10030.)

I. Penalty Phase -- Surrebuttal

Tricia Mulder testified that on back-to-school night, several mothers, including appellant, were so angry at a certain teacher, that they "called him [out] repeatedly on his teaching practices." Appellant showed Mulder "that you just don't back down when it comes to teachers...." (63RT 9969.)

ARGUMENT

I. THE TRIAL JUDGE DID NOT COMMIT MISCONDUCT

A. Overview

Appellant contends in an almost 100-page opening salvo that the trial judge, Judge Wiatt, committed misconduct, was biased, and was prejudiced against her and her counsel, Howard Waco, resulting in a fundamentally unfair trial, denial of the right to a meaningful defense, denial of the right to confrontation and the effective assistance of counsel, and resulted in an unreliable sentencing verdict. Appellant asks this Court to overturn her convictions and sentence as a result of the trial judge's misconduct, because such misconduct is reversible per se. (AOB 47-146.) Respondent disagrees.

At the risk of stating the obvious, this was an extremely long and arduous trial. Both sides presented a substantial number of lay and expert witnesses that included rebuttal, surrebuttal, and even sur-surrebuttal witnesses. It would have been unusual if tempers did not flair, even if the trial judge had the patience of Job. A proper resolution of appellant's judicial misconduct claim requires at the onset an understanding of certain essential facts regarding the nature of this case, the parties involved, and the manner in which the alleged misconduct came about at trial. To begin with, it is important to know that appellant was represented by Los Angeles

County Public Defender Howard Waco, who at the time of trial possessed 35 years of experience as the most senior member of the public defender's office. (22RT 2707.) And in light of all those years of experience, Mr. Waco candidly described his role as an advocate in a death penalty case in undeniably extreme terms: "I would rather be called an incompetent counsel than have my client get the death penalty." (34RT 4690.)

Mr. Waco had a decidedly uphill battle in this case as to both the guilt and penalty phases of this trial. As to guilt, the prosecution's evidence of guilt was overwhelming. There was never any question at trial that appellant killed her four daughters and attempted to kill her son and herself by setting fire to their residence. And appellant's own words left little doubt that she intended this murder-suicide to be a message to her ex-boyfriend and ex-husband. Her suicide note to her ex-boyfriend explained: "I can't live without you in my life-" "I have nothing left[,] you took it all[.]" "I can't do this anymore." (Peo. Exh. 20 B, emphasis in original.) Appellant's parting note to her ex-husband was even clearer: "Now you don't have to support any of us! Fuck you." (Peo. Exh. 36 A, 36 B, emphasis in original.) And it goes without saying that such a spiteful murder of four innocent children made for a difficult penalty phase. (See Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* (1998) 98 Colum. L.Rev. 1538, 1556 (capital sentencing juries grant children special consideration: "[T]he most striking result involves victims who are children. A sizeable majority of jurors would be more likely to impose death if the victim was a child.").)

It was therefore clear to anyone associated with this case that it fell into the category of hopeless defense cases that "can[not] be won by the defense." (*Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1042.) "The hopelessness of some cases may even relegate the most competent defense counsel to the role of official hand-holder." (*Ibid.*) Given the

tremendous odds facing counsel, it is abundantly clear from the record that Mr. Waco, however, chose not to play "the role of official hand-holder," but instead embarked on a "nothing to lose" approach at both the guilt and penalty phases of trial. While a "nothing to lose" approach is too high of a standard for effective assistance of counsel (see *Knowles v. Mirzayance* (2009) 129 S.Ct. 1411, 1490), the record makes clear that Mr. Waco took this standard to new heights. His advocacy was so zealous it bordered on deliberate attempts to interject error into the case, even at the cost of being held in contempt of court and provoking the trial court into sometimes making critical remarks of his performance at trial. As the trial court commented to Mr. Waco "it almost seems like you were trying to inject error into this case." The trial court therefore was prescient in its observation, "if there was ever a case in my experience that stood for the proposition that appellate courts have to give great deference to the trial court's ruling, this is the case, because if you read the sterile record in this case, you don't get the flavor of what Mr. Waco is trying to do." (53RT 8059, 8061.) Respondent therefore is obligated to give the Court the "full flavor" of what defense counsel tried to do in this case.

As will be shown, the overwhelming majority of the remarks appellant claims demonstrate impermissible bias were a direct response to her counsel's improper conduct, questions, and arguments. Mr. Waco persistently pushed and ignored the boundaries of the trial court's evidentiary rulings. To the extent that there was indeed an argumentative, contentious atmosphere during trial between Mr. Waco and the trial judge, it was precipitated by Mr. Waco's relentless gamesmanship.

The trial judge was not biased against appellant or her attorney; rather, he was exercising his inherent authority to control the proceedings to ensure a fair trial for all the participants, even in the face of a defense attorney who would willingly sacrifice his professional reputation rather

than see his client sentenced to death. If, under these circumstances, this Court finds that the trial court was biased and committed misconduct, it will amount to a "green light" for future defense attorneys in capital cases to wreak havoc in the courtroom whenever they have a client, like appellant, facing intolerable odds at trial. The rewards of such a strategy, from a defense perspective, are too tempting: reversal on appeal; a new trial; and lengthy appellate and post-conviction litigation, with the hopes of perpetually staving off a fairly-litigated and fully-justifiable death sentence.

B. Background

At the outset, respondent submits it is necessary to understand background events in order to show how Mr. Waco's behavior, from the very beginning, seemed designed to inject error into this case. Contrary to appellant's argument, the contentiousness in this case began even prior to Judge Wiatt's involvement. This is a good indicator that Judge Wiatt was not the problem here, given that defense counsel made accusations of judicial bias from the start of the case. At the conclusion of the preliminary hearing, Mr. Waco accused the magistrate, Judge Coen, of assisting the prosecution (7CT 2086-2088) and of past conflicts, all of which Judge Coen denied. (7CT 2090.) During pretrial proceedings on December 14, 1998, another jurist, Commissioner Richardson, told Mr. Waco that his arguments regarding the prosecution's lack of standing with regards to the release of certain tapes was "just ridiculous." (2RCT 206; see 3RCT 485.)

There were other ominous signs foreshadowing the problems to come. In a letter from Dr. Debra Wheatley to Judge Wiatt, dated, March 28, 2000, the doctor complained about unethical behavior by Mr. Waco. (9CT 2629.) Dr. Barry Hirsch sent a letter to deputy district attorney Barshop, dated April 4, 2000, regarding material Mr. Waco was withholding. (9CT 2668.)

Nonetheless, Judge Wiatt came into this case with the highest regard for Mr. Waco. Indeed, Judge Wiatt stated on March 2, 2000, his intention

to "tell the jury that in this case *we have perhaps the most experienced defense attorney around.* You will not see any side bar conferences and game-playing. This is going to be a trial with *superb trial lawyers* on both sides." (7RT 247, emphasis added.) Judge Wiatt nonetheless further stated, "I am going to take a very firm role, and this case is going to proceed in an orderly fashion to the extent I am going to make it proceed, and I am not going to have juries waiting around ad infinitum in the hallways, or jurors inconvenienced." (7RT 248.)

On May 2, 2000, a jury was sworn to try the case. (18RCT 4392.) The following day, there were numerous discussions between the court and the parties regarding opening statements, discovery, and evidentiary issues. During the far-ranging discussions, the trial court made a concerted effort to set forth the ground rules for what was going to be a lengthy and vigorously contested case, stating:

> And as long as we're talking about that, no speaking objections will be allowed or tolerated. If there is an objection in front of the jury, you stand: "Objection, your honor, hearsay. Objection, privilege. Objection, relevance. Objection, 352." [¶] State the legal grounds and I will rule on it, and if you think I've ruled incorrectly, you can ask me to approach the bench. What I will do at that point is I will ask if you have any other questions of the witness, and if you do, you will finish those, and at the end of everything else you will be able to approach. [¶] Now, to the extent, as experienced lawyers, you can anticipate or should reasonably anticipate problem areas, bring them up ahead of time, because I am telling you right now, the jury is going to be inconvenienced as little as possible by any side bar interruptions. [¶] If you don't like that, I am sorry, but that's the way it's going to happen. And it may mean witnesses coming back on other dates, and it may mean you not being able to present the case in the streamlined way you want to present it, but I as a trial judge have an obligation to control the proceedings in an orderly fashion, and I will do it.

(14RT 1283.)

The prosecution's case-in-chief began a week later, on May 9, 2000. (18RCT 4433.) The very next day, Mr. Waco filed his first of many motions for mistrial, which was denied. (18RCT 4435; see 17RT 1660-1662 [counsel moved for new trial based on selection of juror that counsel believed had already made up her mind].) The day after that, a second defense motion for a mistrial was denied with prejudice. (18RCT 4437; 18RT 1826-1828 [defense counsel asked for mistrial because the district attorney had asked a question concerning pain to the victims]) And four days later, a third defense motion for mistrial was made on the ground that the prosecution called experts, to wit, Dr. Ribe, and did not provide the information ahead of time to the defense, not only of Dr. Ribe's tape of his examination, but also the notes of Dr. Erlich. That same day, May 15, 2000, the court denied the motion. (18RCT 4444; see 19RT 1984-1991.)

Early on in the prosecution's case-in-chief, on cross-examination of Katherine Castorino, the 911 dispatcher, defense counsel asked her a series of questions on her use and understanding of the term "5150," which referred to section 5150 of the Welfare and Institution Code. (16RT 1486-1487.) The prosecution objected to some of the questions on "relevance" grounds, and the trial court sustained the objections because Castorino was "not an expert" on the law. (16RT 1488.) When defense counsel continued questioning Castorino in this area, the trial court called an in-chambers conference and explained that Castorino was called to authenticate the tape, and defense counsel's questions about Castorino's understanding of the law or her opinion on appellant's state of mind was not relevant. (16RT 1489.) Defense counsel asked for an opportunity to lay a foundation as to Castorino's experience and training, and the trial court stated it would call an Evidence Code section 402 ("section 402") hearing on Friday and order Castorino back. (16RT 1490-1491.) On redirect, the prosecution asked Castorino if she felt harassed by defense counsel when he contacted her.

Castorino said she did, and defense counsel made a "speaking objection." The objection was overruled and counsel was warned "no speaking objections." (16RT 1492.)

During defense counsel's cross-examination of firefighter Bruce Alpern, the trial court sustained some objections and overruled many other objections. (See, e.g., 16RT 1524-1525, 1527-1529, 1535, 1537, 1542-1543, 1545, 1576.) The trial court also admonished defense counsel not to testify. (16RT 1567; see also 1578-1579, 1603-1604.) During redirect examination, the trial court also sustained some defense objections. (See, e.g., 16RT 1619-1620, 1622-1623.)

During defense counsel's cross-examination of appellant's neighbor Benjamin Dibene, the trial court asked him questions about his profession as a highway patrol officer. (17RT 1689-1690, 1695.) After Dibene was excused, and outside the presence of the jury, the trial court admonished defense counsel not to ask argumentative questions of the witnesses. (17RT 1696-1697.)

During defense cross-examination of Gregg Lewison, another of appellant's neighbors, the trial court sustained a series of prosecution objections and then admonished defense counsel in front of the jury for asking a "ridiculous question" ("Were you in a position of seeing who was playing inside or outside, or doing anything, when you were at work from 5:00 in the morning until 5:00 at night?"). (17RT 1712-1713.)

During defense cross-examination of Deputy Michael Wilson, the trial court asked some questions. (20RT 2249.) The trial court admonished defense counsel to limit his cross-examination to the scope of the direct examination, or else call Deputy Wilson as a defense witness. (20RT 2251.) When defense counsel persisted in asking questions outside of the scope of direct examination, the trial court excused Deputy Wilson while defense counsel was questioning him. (20RT 2252.)

During defense cross-examination of Cathy Spaid, the trial court admonished Mr. Waco, *outside* of the presence of the jury, about making speaking objections. The court stated, "you continue to violate the court's order repeatedly." (20RT 2300.) The court admonished Mr. Waco, "No speaking objections. No editorial comments. No stream of consciousness, no childish, unethical behavior." (20RT 2301.)

During defense cross-examination of Dr. James Ribe, the trial court asked the doctor a few questions. (17RT 1745-1746, 1751.) The trial court also directed defense counsel to ask more pointed questions. (17RT 1749; see also 1752-1753.) After a series of prosecutorial objections were sustained, trial counsel was once-again admonished not to make "speaking objections" and the trial court granted a defense request for a side bar. There was a discussion on how trial counsel could phrase a question to Dr. Ribe concerning the determination of when the victims died. (17RT 1755-1759.) After sustaining another prosecutorial objection to a hypothetical question, defense counsel invited the court to "try." The trial court asked Dr. Ribe whether he had an opinion as to time of death. Dr. Ribe responded that the girls died, "sometime between the time they were last known to be alive and the time when the bodies were found." (17RT 1760; see also 18RT 1842 [in response to trial court question, Dr. Ribe testified that all four children had died between "a number of hours and less than 24 hours"].) The trial court admonished defense counsel to not ask further questions about the time of death absent a further offer of proof. (17RT 1761.) Defense counsel made a further offer of proof. (17RT 1767-1768.) The trial court allowed defense counsel to ask Dr. Ribe the outside limit of the time of death of the girls. The trial court asked defense counsel to get to the point and be direct. (17RT 1769.) Dr. Ribe finally testified that, just looking at the bodies themselves, and not considering that the bodies were discovered around 1:15 p.m., and the bodies were observed by a coroner's

investigator between 8:00 p.m. and 9:00 p.m., the girls could have been dead for from four to 24 hours. (17RT 1772.) In the presence of the jury, defense counsel was later more forcefully admonished for making a speaking objection. (17RT 1776.) The trial court asked Dr. Ribe more questions, for which defense counsel thanked the court. (17RT 1777-1778.) The trial court interrupted again and asked some questions, and defense counsel again thanked the court. (17RT 1789.) The trial court admonished defense counsel not to ask any more questions about the children not having signs of child abuse on their bodies. (17RT 1794-1795.)

On cross-examination of arson investigator John Ament, defense counsel responded to an objection based on "speculation" by noting, "Everything [Ament] said is speculative." The trial court did not respond. (18RT 1933.) Shortly thereafter, the trial court interrupted cross-examination and questioned Ament briefly. (18RT 1940-1941, 1951-1952, 1961.) The trial court instructed the jury regarding the court's duties to control the questioning. (18RT 1972-1973.) The trial court again admonished the attorneys "no speaking objections." (18RT 1974.)

Another contested issue involved the defense refusal to turn over expert witness notes to the prosecution. The trial court ruled outside the jury's presence that the psychologist's or psychiatrist's notes of conversations with appellant were not discoverable "at this point." (18RT 1976.) Mr. Waco stated that he had not given the prosecution "notes of the psychiatrist" relating to appellant's statements "or between psychiatrists," but had given the prosecution "all testing related to the notes." (18RT 1978.) Mr. Waco argued that "it's not discoverable at this stage until they testify." (18RT 1978-1979.) The trial court warned Mr. Waco, "if it turns out there's a discovery violation, one of the sanctions is exclusion of the testimony." The trial court further warned, "if you are wrong, Mr. Waco,

your client is going to bear the consequences of it, not you." (18RT 1979; see also 1982; 19RT 1984-1987.)

On redirect of Ament, the trial court once more admonished defense counsel in the presence of the jury not to make speaking objections. (19RT 2078.) On cross-examination of Volk, the trial court again warned Mr. Waco, this time outside the presence of the jury, that there would be no speaking objections. (19RT 2120.) The trial court once again explained what constituted a "speaking objection." (19RT 2121; see also 14RT 1283 [prior explanation of and warning against speaking objections].) The trial court warned that it would impose monetary sanctions for any further violations. (19RT 2122.) At one point, the trial court questioned Volk. (19RT 2128.) Volk testified on cross-examination that after he broke up with appellant in June, he left her a message on her answering machine telling appellant she could be the "best man" at Volk's marriage to his other girlfriend. (23RT 2755.)

On May 16, 2000, court and counsel conferred regarding scheduling of witnesses. Judge Wiatt initially denied a defense request to take witnesses out of order. (20RT 2201.) Yet, Judge Wiatt allowed defense witness Clare Csernay to testify out of order for the convenience of the witness. (18RCT 4447.) During cross-examination of Alethea Volk, defense counsel objected to taking David Nieves out of order and breaking up his cross-examination of Alethea. The trial court overruled the objection. (20RT 2380-2383.)

On May 17, 2000, while cross-examining David Nieves, Mr. Waco attempted to show David a copy of a calendar, without first showing the document to the prosecution. Judge Wiatt told Mr. Waco to show it to the prosecution, but Mr. Waco still persisted in trying to show the document first to David. Finally, Judge Wiatt told Mr. Waco, in the presence of the jury, "You don't listen, do you?" (21RT 2452.) Judge Wiatt subsequently

admonished Mr. Waco, outside of the presence of the jury, not to question David about any documents until Mr. Waco first showed the items to the prosecutors, and to do that in court beforehand; not to mention it in front of the jury, not to mark the documents, and if there was any objections, not to show the document at that time. (21RT 2474.) Judge Wiatt reviewed the People's opening statement and ruled that the People had put appellant's state of mind at issue, so defense counsel would be allowed "some leeway in presenting evidence about the defendant's existing state of mind." (21RT 2476.)

On this same date, Judge Wiatt again warned Mr. Waco about making speaking objections. (21RT 2510.) Judge Wiatt also questioned David Nieves about when Scott Volk moved in (21RT 2512), about how appellant parked her van (21RT 2524), and about an exhibit (21RT 2534). In front of the jury, Judge Wiatt told Mr. Waco that his questions to David about how he got in the van were misleading. Judge Wiatt sustained his own objection to further questions from Mr. Waco about how David got out of the van. (21RT 2528.) The jury was admonished that what Mr. Waco said was not evidence. (21RT 2543.)

On May 18, 2000, David Nieves and Alethea Volk both resumed their testimony for the prosecution. Mr. Waco made a comment in the presence of the jury, "seems like a tag team match here," when the trial court sustained tandem objections from both prosecutors, Mr. Barshop and Ms. Silverman. The court did not respond to Mr. Waco's "tag team" comment. (22RT 2680.) Mr. Waco then made another comment, "Let me do the same thing" (22RT 2681) and then more comments (22RT 2682).

At a sidebar outside of the presence of the jury, Judge Wiatt agreed with Mr. Waco and overruled the prosecution's objections. (22RT 2683.) During redirect examination of Alethea, the prosecutor asked her "do you have any idea how the defendant acted in the privacy of her own home with

respect to the children?" Mr. Waco commented, "You've got to be kidding. Objection." Judge Wiatt cleared the courtroom (22RT 2693) and sanctioned Mr. Waco for willfully disobeying a court order. Sanctions in the amount of $500 were imposed but set aside after Mr. Waco apologized. (18RCT 4467-4468; 22RT 2694-2696, 2706-2707.) Judge Wiatt nonetheless *sustained* Mr. Waco's objection to the last question. (22RT 2696.) Judge Wiatt noted that Mr. Waco had been a deputy public defender since 1965 and was the most senior deputy public defender in the county. (22RT 2707.) Mr. Barshop raised for the first time the issue of "invited error," "by the manner of [Mr. Waco's] speaking objections." (22RT 2708-2709.)

On May 22, 2000, during further cross-examination of Scott Volk, Judge Wiatt admonished Mr. Waco, in the presence of the jury, that there were to be no speaking objections. (23RT 2737.) Judge Wiatt again admonished Mr. Waco not to make speaking objections. (23RT 2749.) Judge Wiatt then overruled the prosecutor's objection and allowed Mr. Waco to ask Volk about Volk's impressions when appellant left a voice mail for him at work telling him there had been a fire. (23RT 2759-2762.) During Fernando Nieves's testimony, Judge Wiatt again admonished Mr. Waco, in the presence of the jury, not to make speaking objections. (23RT 2798.)

During a hearing outside the presence of the jury regarding Mr. Waco asking Fernando questions about prior bad acts, for purposes of impeachment, Judge Wiatt accused Mr. Waco of lying and ruled that he would not permit this line of questioning until there had first been a full Evidence Code section 402 hearing. (23RT 2860-2862.) Judge Wiatt then admonished the jury that statements of the attorneys were not evidence. (23RT 2869.) Outside the presence of the jury, the prosecutor then asked Judge Wiatt to sanction Mr. Waco. Judge Wiatt accused Mr. Waco of

"acting the fool in front of the jury" (23RT 2916) and trying to "inject some prejudice into this trial" (23RT 2918).

On May 23, 2000, Fernando Nieves testified for a second day. (18RCT 4476.) Judge Wiatt interrupted cross-examination of Fernando to ask questions. (24RT 2943-2944, 2946-2947, 3001-3002.) Judge Wiatt also advised Mr. Waco, in the presence of the jury, on how to frame his questions to draw fewer objections. (24RT 2948.) Mr. Waco was again admonished, in the presence of the jury, not to make speaking objections. (24RT 2978.) Judge Wiatt also sustained his own Evidence Code section 352 objection regarding Fernando's knowledge of appellant's weight fluctuations. (24RT 2984.) Judge Wiatt also told Mr. Waco, in the presence of the jury, that his cross-examination of Fernando would be limited to noon of that day. (24RT 3006.) Shortly thereafter, Judge Wiatt cleared the courtroom after Mr. Waco asked Fernando his opinion on why appellant killed the children. (24RT 3008.) The judge stated, "it would be incompetence of counsel to ask a witness like this about the ultimate issue in this case." Judge Wiatt further stated, "I'm not going to let you sabotage your client and be incompetent, and then have this case reversed on appeal many years later." (24RT 3009.) Judge Wiatt further told Mr. Waco, "Your behavior throughout this case ... is deliberate.... You're trying to inject error into this case." (24RT 3010.) The prosecutor stated that Mr. Waco was not asking questions in good faith, and was using a police report that said the opposite of what Mr. Waco purported regarding Fernando telling the police he agreed to be a reference on the rental application, but not a tenant. (24RT 3019-3020.)

Judge Wiatt ruled that in the future, anytime Mr. Waco wanted to use a document to impeach a witness, there would be an Evidence Code section 402 hearing in advance. (24RT 3021.) Judge Wiatt stated, "I do not trust Mr. Waco to be able to abide by the rules." (24RT 3021-3022.) Mr. Waco

continued to make speaking objections, and Judge Wiatt struck his comments, in the presence of the jury. (24RT 3030-3031.) Outside the presence of the jury, Judge Wiatt stated that Mr. Waco was trying to mislead the jury about whether Dave Folden stole the van parked at appellant's Cherry Creek Drive residence, after the prosecutor presented a court order that allowed Folden to take the van. (24RT 3111.)

On May 24, 2000, the testimony of Dave Folden continued. (18RCT 4478.) Judge Wiatt warned Mr. Waco not to make "extrinsic comments." (25RT 3179.) Judge Wiatt questioned Folden. (25RT 3182.) Judge Wiatt also admonished the prosecutor not to approach a witness with a document unless it was first shown to Mr. Waco. (25RT 3251.) Judge Wiatt struck comments from Mr. Waco and the prosecutor, Ms. Silverman. (25RT 3298, 3315.) Judge Wiatt admonished all counsel not to make comments in front of the jury (25RT 3347) and further warned he would impose sanctions if they made any more comments in front of the jury (25RT 3350).

On May 25, 2000, Judge Wiatt questioned a prosecution witness, Wesley Grose, during cross-examination. (26RT 3373, 3374.) Judge Wiatt ruled, in the presence of the jury, that Mr. Waco had asked Grose a question in violation of an Evidence Code section 402 ruling. (26RT 3378.)

Judge Wiatt sustained numerous objections made by Mr. Waco during direct examination of Detective Taylor. (26RT 3393-3394.) Judge Wiatt admonished Mr. Waco and Ms. Silverman in front of the jury regarding comments and showing things to opposing counsel before approaching the witness. (26RT 3400-3401.) Judge Wiatt also admonished Mr. Waco in front of the jury to stop saying "ah" (26RT 3418) and "okay" (26RT 3437). Judge Wiatt, in the presence of the jury, struck comments by Mr. Waco. (26RT 3445.) Judge Wiatt admonished Mr. Waco not to comment and

admonished the jury to disregard his comments. (26RT 3450.) Judge Wiatt asked Detective Taylor some questions during cross-examination. (26RT 3470-3471.) Judge Wiatt struck more comments by Mr. Waco, in the presence of the jury. (26RT 3478.) Mr. Waco stated he was not prepared to discuss jury instructions on the following day. (26RT 3537.) Mr. Waco would not state who his first witness would be. (26RT 3538.) Mr. Barshop stated that the prosecution had not received discovery as to defense experts. (26RT 3540.) Mr. Waco stated he had the "right to wait until [the experts] are called." (26RT 3541.)

On May 26, 2000, Mr. Waco's motion for mistrial based on Judge Wiatt calling him a liar was argued. (18RCT 4485; 27RT 3550, 3569-3571.) During the hearing on the motion, Mr. Waco further wanted to know why the burden was on him to cite page and line numbers of transcript when trying to impeach a witness with prior inconsistent testimony (27RT 3573) and why the prosecution should get the opportunity to respond to his objections (27RT 3574). Judge Wiatt stated he had not denied Mr. Waco the opportunity for sidebar conferences or to "make a record." (27RT 3575-3576.) The court denied the motion for mistrial. (27RT 3578.) Mr. Waco then stated he had given "everything we have from any doctor." (27RT 3578.) Judge Wiatt stated, "If it turns out the doctor has something, and haven't provided it to you, that may generate delay." (27RT 3579.) Mr. Barshop then stated that Mr. Waco had given him Internet articles that he had to review and copy, and he would need another month to be ready to cross-examine defense experts. (27RT 3580.)

On May 30, 2000, Judge Wiatt ruled that Mr. Waco had willfully disobeyed the discovery statute by withholding statements by defense

witnesses. (28RT 3703-3705.)[11] Judge Wiatt informed the jurors that Mr. Waco had not complied with the discovery statute and that was why they needed to take a break. Judge Wiatt further instructed the jurors on discovery noncompliance. (28RT 3710.) Judge Wiatt told Mr. Waco, outside the presence of the jury, that he was considering finding him in contempt of court and he should consider having an attorney present in the future. (28RT 3713.) During direct examination of Dan Skipper, Mr. Waco violated the court's order against speaking objections. (28RT 3717.) During a hearing regarding defense witness Henry Thompson, Judge Wiatt found Mr. Waco had again withheld discovery in the form of statements by witnesses and Mr. Waco was ordered to turn over all discovery. (28RT 3731-3732.) There was an Evidence Code section 402 hearing with Henry Thompson. (28RT 3734.) Judge Wiatt ruled Thompson's testimony was not relevant and was inadmissible under Evidence Code section 352. (28RT 3750-3751.) Judge Wiatt stated that Mr. Waco "got caught" misleading the court, counsel, and jury with regards to the cross-examination of Dave Folden. (28RT 3753.) Judge Wiatt again found Mr. Waco had willfully violated the discovery statute by withholding statements of witnesses, now the Lucias. (28RT 3757-3759.) Mr. Waco stated Judge Wiatt had already imposed two discovery sanctions: (1) allowing the prosecution a continuance to prepare for the witnesses and (2) informing the jury about the discovery violation. (28RT 3760.) Ultimately, Judge Wiatt left open the possibility of Henry Thompson testifying. (28RT 3764.)

On May 31, 2000, Mr. Waco told Judge Wiatt, out of the presence of appellant and the jury, that he may have cancer. Judge Wiatt stated he

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[11] The discovery violation is explored in greater depth in Argument XI, *infra*.

might ask to see a declaration from a doctor. (29RT 3766-3768.) Mr. Waco gave an offer of proof as to the testimony of Al and Penny Lucia. (29RT 3771-3775.) The prosecution stated they were not prepared to cross-examine the Lucias because of late discovery. (29RT 3775.) There was discussion regarding a continuance so prosecution experts could read the reports of the defense's doctors and then interview appellant. Judge Wiatt stated he was considering precluding the defense mental health experts if appellant did not agree to be examined under the same conditions as the defense doctors. (29RT 3782-3783.) Judge Wiatt accused Mr. Waco of causing the "outrageous" continuance of the trial for two to four weeks by withholding defense expert reports. (29RT 3786-3787) Judge Wiatt stated that defense expert Dr. Kaser-Boyd needed to be present and ordered Kaser-Boyd to be present at 1:30 that day, and witnesses Hill and Wood the following day. (29RT 3788-3789.) Judge Wiatt declined the prosecution's request to find that Mr. Waco was asking Del Winter questions in violation of the court's Evidence Code section 402 ruling; Judge Wiatt told Mr. Barshop, "you have closing argument." (29RT 3847.)

There was an Evidence Code section 402 hearing, with testimony from Dr. Kaser-Boyd. (29RT 3867-3895.) The hearing continued with the testimony of Dr. Barry Hirsch. (29RT 3896-3906.) Based on Hirsch's testimony, Judge Wiatt estimated the prosecution would need a four-week continuance. Judge Wiatt stated he would speak to the jurors. (29RT 3906.) Judge Wiatt further stated he would order appellant to submit to testing by Dr. Hirsch with no one from the defense present. (29RT 3907.) Judge Wiatt also stated there could be a mistrial, if it was requested by the defense. (29RT 3912.)

On June 1, 2000, the prosecution argued for discovery sanctions short of exclusion of expert witnesses. (30RT 3944.) Mr. Waco refused to allow appellant to be examined by Dr. Hirsch. (30RT 3952.) Judge Wiatt

admonished Mr. Waco, in the presence of the jury, not to make speaking objections (30RT 3973) and Mr. Barshop not to make "editorials" (30RT 4061). The trial court told Mr. Waco that it was Mr. Waco's decision to delay disclosure of the experts' notes and Mr. Barshop had stated long ago he may need a continuance due to the delayed disclosure. (30RT 4083-4084.) Mr. Waco stated, "If you do it accurately [inform the jury of the cause for the delay], I guess no one can complain." (30RT 4084.) Judge Wiatt admonished the jurors and recessed the trial until June 19, 2000. Judge Wiatt ordered defense experts Doctors Kaser-Boyd and Humphrey to appear in court on June 5, 2000 with their entire case files. (18RCT 4512; 30RT 4121, 4123-4124, 4126.) Judge Wiatt explained to the jury why the trial needed a 2-week continuance for expert testimony. (30RT 4112-4113.) Judge Wiatt told the jury that Mr. Waco failed to timely disclose statements from several defense witnesses. (30RT 4114.) Mr. Waco objected to the second part. (30RT 4115.) Judge Wiatt imposed a money sanction pursuant to Code of Civil Procedure section 177.5[12] for violation of a lawful court order without substantial justification. (30RT 4117-4118.)

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[12] Code of Civil Procedure section 177.5 provides:

> A judicial officer shall have the power to impose reasonable money sanctions, not to exceed fifteen hundred dollars ($1,500), notwithstanding any other provision of law, payable to the court, for any violation of a lawful court order by a person, done without good cause or substantial justification. This power shall not apply to advocacy of counsel before the court. For the purposes of this section, the term "person" includes a witness, a party, a party's attorney, or both.
>
> Sanctions pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or on the court's own motion, after notice and opportunity to be heard. An order imposing sanctions shall be in writing and shall recite in detail the conduct or circumstances justifying the order.

On June 5, 2000, the parties were in court without the jury. Mr. Waco no longer objected to further medical tests for appellant, but still declined to have her interviewed by prosecution experts unless restrictions were imposed. The prosecution declined to proceed with the testing unless their experts could interview appellant unfettered with defense restrictions. Doctors Humphrey and Kaser-Boyd each retired with a court reporter to dictate their case notes. (18RCT 4525; 31RT 4131-4136, 4139-4145.) Judge Wiatt imposed a $500 sanction against Mr. Waco. (18RCT 4526; 31RT 4136-4137.)

On June 12, 2000, Judge Wiatt imposed further monetary sanctions against Mr. Waco in the amount of $500. (18RCT 4567; 31RT 4151-4165.)

On June 15, 2000, Judge Wiatt provided Mr. Waco a copy of the court's discovery order filed April 11, 2000. Judge Wiatt stated that Mr. Waco had previously received a copy of the order. (18RCT 4604, 4636; 34RT 4644.)

On June 16, 2000, Judge Wiatt stated that defense attorney Terry Towery had lied to the court regarding the existence of a discovery order. (34RT 4668.) When Mr. Waco referred to the trial court's hostile demeanor, Judge Wiatt denied any vehemence in his demeanor. (34RT 4681.) Mr. Waco requested a mistrial, stating appellant could not get a fair trial from Judge Wiatt. (34RT 4682.) Judge Wiatt denied the mistrial motion. (34RT 4684-4685.) Mr. Waco then stated, "I would rather be called an incompetent counsel than have my client get the death penalty." (34RT 4690; see also 34RT 4723-4725, emphasis added.) Mr. Waco further stated, "maybe I was incompetent to misinterpret the court ...." (34RT 4719, emphasis added.) Mr. Waco told Judge Wiatt that he had no idea who he was going to call as a witness on the following Monday, June 19, 2000. (34RT 4749.)

On June 19, 2000, Doctor Diane Barrows contacted the prosecution and stated that Mr. Waco had been pressuring her to make certain statements that were not true regarding appellant's state of mind at the time of her abortion. (35RT 4765-4767.) Mr. Waco complained of due process and discovery violations and filed a motion for mistrial, due to judicial misconduct. (18RCT 4638; 35RT 4770.) The motion was denied. (18RCT 4640; 35RT 4771-4773.)

A defense motion to continue was denied. Twelve minutes before the jury returned back, Mr. Waco stated he was still not sure who he would call as the next witness. (35RT 4774.) Judge Wiatt warned Mr. Waco not to violate any further court orders or Mr. Waco would be found in contempt or sanctioned. (35RT 4776.) Judge Wiatt admonished all the attorneys not to make speaking objections. (35RT 4777.) Mr. Waco objected to Judge Wiatt's ruling that appellant had to testify first before her experts could testify. (35RT 4779.) Appellant was then sworn and testified on her own behalf. (18RCT 4641; 35RT 4783.) Mr. Waco was admonished, in the presence of the jury, not to make speaking objections. (35RT 4907.) During cross-examination, Judge Wiatt ordered appellant to look at the photos of her dead children. (35RT 4932-4934, 4937.)

On June 21, 2000, Judge Wiatt signed an order sanctioning Mr. Waco $750 for making a speaking objection. (18RCT 4647; 37RT 5038, 5062-5064, 5259-5263.) There were further discussions regarding instructing jurors during trial on discovery violations by defense. (37RT 5046-5048.) There were also further discussions regarding appellant's refusal to be examined by prosecution experts. Judge Wiatt stated he would instruct the jury regarding appellant's refusal if there was sufficient evidence to warrant the instruction. (37RT 5048-5051.)

During these discovery discussions, Mr. Waco stated that the prosecutors were "cheerleader[s]" for the court. (37RT 5054.) Judge Wiatt

warned Mr. Waco that any further comments along those lines would be "contempt of court." (37RT 5055.) Judge Wiatt subsequently told the jurors that they were breaking early because of the defense's failure to have their witnesses available in a timely manner. (37RT 5104.)

The prosecutors objected to the use of Dr. Humphrey's overheads because they were not provided earlier. Mr. Waco then objected that the prosecutors brought in overheads for their DNA expert. Judge Wiatt stated that there had been no defense objection to that. (37RT 5120-5121.) Judge Wiatt told Mr. Waco, in the presence of the jury, to sit down and stop questioning Dr. Humphrey; that he could reopen after another Evidence Code section 402 hearing. (37RT 5210.) Judge Wiatt again ordered Mr. Waco, in the presence of the jury, not to make speaking objections. (37RT 5217.) Judge Wiatt informed Dr. Humphrey that she had violated a gag order by mentioning PET scans. (37RT 5230-5232.) Judge Wiatt warned Dr. Humphrey that she was in danger of being found in contempt of court. (37RT 5233.)

On June 22, 2000, Mr. Waco made an oral motion for mistrial based on Judge Wiatt's denial of the opportunity to ask Dr. Humphrey questions in an "orderly fashion" by allowing the prosecution to "break into" defense counsel's direct examination with cross-examination. The motion was denied. (38RT 5264-5267.) Judge Wiatt instructed the jury that any questions asked by Ms. Silverman regarding Dr. Gold were stricken and to be disregarded. (38RT 5279.) During cross-examination by Ms. Silverman, Dr. Humphrey conceded that she had withheld information regarding normative data. (38RT 5294-5295.) Judge Wiatt again admonished Mr. Waco, out of the presence of the jury, not to make "speaking objections." Judge Wiatt order Mr. Waco to pay $1,050 in sanctions for violating the court's order against speaking objections. (38RT 5296-5297.)

Judge Wiatt ordered Dr. Humphrey, out of the presence of the jury, not to talk over the court reporter, or she would be sanctioned. (38RT 5319-5320.) Judge Wiatt stated there was no need for further hearings on sanctions. (38RT 5329.) Judge Wiatt again admonished Mr. Waco, in the presence of the jury, not to make "speaking objections." (38RT 5348.) Judge Wiatt stated he was very concerned about Dr. Humphrey withholding information from the prosecution. Judge Wiatt wanted to excuse Dr. Humphrey and have Dr. Brook testify out of order. (38RT 5362.) Judge Wiatt ordered Dr. Humphrey, out of the presence of the jury, to get "every scrap of paper" and return to court in the afternoon. (38RT 5365.) Mr. Waco objected to the prosecutors using exhibits he said he had never seen: the prosecution countered that Mr. Waco had seen the exhibits. (38RT 5367-5369.) Judge Wiatt told Mr. Waco that he would limit his cross-examination of Dr. Brook. (38RT 5433.)

On June 23, 2000, the Court of Appeal stayed the order of sanctions made on June 21 and June 22, 2000. (18RCT 4657; 39RT 5492, 5495.) During an in camera ex parte hearing with prosecutors and Dr. Hirsch, Judge Wiatt found there was no duty on the part of the prosecution to provide discovery to the defense at that time. (39RT 5497.) Dr. Humphrey was called as a witness at an Evidence Code section 402 hearing regarding discovery violations. (39RT 5506.) Dr. Humphrey testified that she received information regarding new norms from Dr. Satz. (39RT 5507; Peo. Exh. 73.) Judge Wiatt stated the reason for the hearing was that he had ordered Dr. Humphrey to turn over a document at 1:30 p.m. and she did not turn it over until 5:00 p.m. (39RT 5508-5509.) Dr. Brook testified next at the section 402 hearing. (39RT 5560.) Dr. Brook talked to Dr. Satz, who stated he did not give Dr. Humphrey new norms. Dr. Satz denied knowing anything about People's Exhibit 73. (39RT 5562.) Judge Wiatt stated he believed that Dr. Humphrey had perjured herself. (39RT 5569.)

Judge Wiatt stated that Mr. Waco was making "stupid" arguments regarding the prosecution's right to appointed experts. Mr. Waco argued that the prosecutors had not shown themselves to be indigent. (39RT 5578.) Mr. Waco further argued that Judge Wiatt had become an "agent" for the prosecution. (39RT 5579.) Judge Wiatt ordered Mr. Waco to contact Dr. Ney and have Dr. Ney bring his entire file to court. (39RT 5580.)

On June 26, 2000, Judge Wiatt ordered Mr. Waco to provide the prosecution with Mr. Waco's letter to Dr. Ney dated August 6, 1999. (40RT 5597.) Judge Wiatt again admonished Mr. Waco, in the presence of the jury, not to make speaking objections. (40RT 5609.) Mr. Waco was further admonished, outside the presence of the jury, not to make "editorial comments." (40RT 5614.) Judge Wiatt imposed monetary sanctions on Mr. Waco -- in the presence of the jury -- for violating the court's order against speaking objections. Outside of the presence of the jury, Judge Wiatt stated that the amount of sanctions was $1,100. (40RT 5615-5618.) Mr. Waco made an oral motion for a mistrial, because Judge Wiatt had given the prosecution "excessive leeway" in asking witnesses questions. Judge Wiatt denied the motion. (40RT 5631-5633.) Judge Wiatt admonished Mr. Waco outside the presence of the jury that Dr. Ney was not to offer an opinion on "ultimate questions" pursuant to Penal Code section 29. (40RT 5750.) Judge Wiatt suggested to Mr. Waco that he ask hypothetical questions to avoid this problem. (40RT 5751, 5758-5759.)

On June 27, 2000, Mr. Waco complained that Judge Wiatt had gotten angry with him and banged his gavel. Judge Wiatt explained that he banged the gavel, not out of anger, but to control the proceedings because Mr. Waco and Dr. Ney were talking over each other. (41RT 5922.) Mr. Waco made an oral motion for a mistrial "with regards to the last couple of days activities." The motion was heard and denied. Judge Wiatt advised

Mr. Waco that any future motions for mistrial must be made in writing. (41RT 5821-5828.) During Dr. Ney's Evidence Code section 402 hearing, certain discovery from Dr. Ney was handed over to the prosecution for the first time. (41RT 5842-5843.) During the hearing, Judge Wiatt questioned Dr. Ney about his views on abortion. (41RT 5845-5848.)

During questioning by Ms. Silverman, Dr. Ney stated that it would be "impossible" for him to bring in all of the material he had relied upon in forming his opinions. Judge Wiatt stated that if there had been a discovery violation, an appropriate sanction could be to exclude Dr. Ney's testimony. (41RT 5851-5853.) Judge Wiatt stated it would not be appropriate to have Dr. Ney testify any further until the discovery dispute was resolved. (41RT 5857-5858.) Judge Wiatt stated there appeared to be a defense failure to comply with the law of discovery. (41RT 5862.) Judge Wiatt told the jury that the "defense provided to the prosecution some new documents from Dr. Ney" and as a result there would be a break so that Judge Wiatt could determine whether the defense had committed a discovery violation. (41RT 5867-5868.) Dr. Ney was ordered to return on June 29, 2000. (41RT 5997.) Mr. Waco filed a motion to disqualify Judge Wiatt. (19RCT 4663; 41RT 5921, 5993.)

On June 29, 2000, Juror Number 1 wrote a note to the court, complaining that Mr. Waco was laughing at the jurors. (19RCT 4671; 42RT 6183-6184, 6187.) The court reporter confirmed that Mr. Waco was laughing towards the jury. (42RT 6214.) That same day, Mr. Waco filed an amended motion to disqualify Judge Wiatt. (19RCT 4673.) That day, outside the presence of the jury, Judge Wiatt and counsel went through the stack of material from Dr. Ney and discussed various objections based on attorney-client privilege, doctor-patient privilege, and work product privilege. (42RT 6000-6021.)

During further discussion of discovery issues regarding Dr. Ney's materials, Mr. Waco interrupted Ms. Silverman numerous times, prompting Judge Wiatt to order Mr. Waco to sit down and not say a word until directed by the court. (42RT 6036-6037, 6039.) Mr. Waco later accused Judge Wiatt of calling him a liar a half dozen to a dozen times. Judge Wiatt denied the accusation and accused Mr. Waco of making a "false statement." Judge Wiatt stated, "If you search through this transcript, you won't find "liar" used six times in reference to yourself." (42RT 6054.)

Mr. Waco stated he was ordered by his supervisor to go to UCLA for a physical and mental checkup because the supervisor was concerned Mr. Waco could not do the job. (42RT 6056.) Mr. Waco stated he was very anxious and quite upset. (42RT 6059.) The prosecution asked for discovery sanctions against Dr. Ney and Mr. Waco of $1,500 each and a jury instruction on the discovery violation. (42RT 6069.) Mr. Waco was again warned, in the presence of the jury, not to make "speaking objections" during the prosecution's cross-examination of Dr. Ney. (42RT 6115.) Mr. Waco filed a second motion to disqualify Judge Wiatt and withdrew the first motion to disqualify. (42RT 6118-6119.) Mr. Waco stated he was not prepared to discuss jury instructions. (42RT 6121.) Judge Wiatt ordered all counsel to have a list of instructions ready by July 5. (42RT 6122.) Mr. Waco was again admonished in the presence of the jury not to make speaking objections. (42RT 6126.) Judge Wiatt then ordered Ms. Silverman, in the presence of the jury, to "get onto something else" during her cross-examination of Dr. Ney. (42RT 6127.) Judge Wiatt later admonished Ms. Silverman outside of the presence of the jury to "streamline" her questioning (42RT 6144) and not to make "that kind of comment" in disparagement of Dr. Ney (42RT 6146), and in the presence of the jury not to use the word "these" and to restate her question (42RT 6164). Judge Wiatt also admonished Mr. Waco outside of the presence of

the jury not to say, "Thank you, your honor," when the trial court told Ms. Silverman to restate a question. (42RT 6165.) Outside the presence of the jury, the trial court told Ms. Silverman her questioning of Dr. Ney was "getting nowhere with this jury." (42RT 6182.) Dr. Ney was ordered back July 5th. (42RT 6208, 6214.)

On July 5, 2000, the prosecution's oral request for sanctions for failure to comply with discovery was heard and denied as to Dr. Ney. Judge Wiatt requested that the prosecution make all future requests for sanctions against defense counsel in writing. (19RCT 4740; 43RT 6237, 6433-6434.) Judge Wiatt again advised Mr. Waco to ask questions of Dr. Ney in the form of hypothetical questions. (43RT 6235.) Mr. Waco made an oral motion for mistrial based on the prosecution going through Dr. Ney's files. (43RT 6240.)

Mr. Barshop stated they were looking for a particular page and did not read anything else. Judge Wiatt denied the motion for mistrial. (43RT 6241.) Outside the presence of the jurors, Judge Wiatt admonished Mr. Waco not to shake his head when the court sustained an objection. (43RT 6251.) In the presence of the jury, Mr. Waco asked Dr. Ney a series of questions to which objections were sustained; Judge Wiatt advised Mr. Waco, in the presence of the jury, that it would be "helpful" to ask the question in the form of a hypothetical. (43RT 6285.) After more objections, Judge Wiatt again asked Mr. Waco, outside of the presence of the jury, to ask hypothetical questions of Dr. Ney. (43RT 6289.) Outside of the presence of the jury, there was an Evidence Code section 402 hearing with Dr. Ney regarding what Al Lucia told him about appellant's epileptic seizures as an adult. (43RT 6291.) Judge Wiatt ruled that Mr. Waco could ask questions about the epileptic seizures in the form of a hypothetical. (43RT 6292, 6294.) Dr. Ney, however, would not be allowed to testify

about the abortion clinic where appellant had her abortion, unless Mr. Waco laid a foundation. (43RT 6295-6297.)

Judge Wiatt thereafter sustained a series of objections to Mr. Waco's questions of Dr. Ney regarding appellant's history of adult seizures; the questions were not in the form of a hypothetical. Judge Wiatt stated he would not allow Dr. Ney to give an opinion based on unreliable hearsay. (43RT 6299.) Judge Wiatt gave Mr. Waco an example of a proper hypothetical. (43RT 6299-6300.) Judge Wiatt further told Mr. Waco, "Maybe you need to get somebody else to help you formulate some questions." (43RT 6302.) Mr. Waco stated that the prosecutors had been making "speaking objections all morning." Judge Wiatt disagreed. (43RT 6303.)

Mr. Waco objected to prosecution witness Dr. Chang being called out of order, but Judge Wiatt overruled the objection, observing that Dr. Chang was a percipient witness who was not being paid for his time, and his testimony would have no impact on Dr. Ney completing his testimony that day. (43RT 6313-6314.) Mr. Barshop later asked for sanctions against Mr. Waco for asking Dr. Ney about a letter Mr. Waco sent him referring to Mr. Barshop offering appellant a deal for life in prison. (43RT 6372-6375.) Judge Wiatt admonished Mr. Waco, outside of the presence of the jury, not to refer to the letter again and threatened to report Mr. Waco to the state bar and to write a letter to the head of Mr. Waco's office regarding Mr. Waco's "intolerable" and "indefensible" conduct. (43RT 6377.)

On July 6, 2000, Mr. Waco filed a motion for reconsideration of the *Kelly/Frye* ruling excluding PET scan evidence; the motion was heard and denied as to the guilt phase and as to the penalty phase, Judge Wiatt stated, "we can discuss that at a later time." (44RT 6443.) Mr. Waco's request for an Evidence Code section 402 hearing and imposition of sanctions, requests for continuance and to bar testimony, all concerning prosecution witness

Dr. Dehaan, were heard and denied. (19RCT 4772; 44RT 6444-6453, 6465-6466, 6469, 6505-6506.) Mr. Waco's motion for mistrial was heard and denied. (19RCT 4773; 44RT 6458-6464, 6466, 6542, 6573-6574.) Judge Wiatt admonished Mr. Waco, in the presence of the jury, not to make speaking objection during the testimony of Dr. Dehaan. (44RT 6498.) Outside of the presence of the jury, Judge Wiatt told Mr. Waco he would not allow him to ask any more questions of Dr. Dehaan as to whether the fire was "rational" or "irrational." (44RT 6563.) Mr. Waco objected to Judge Wiatt questioning Dr. Dehaan about being on TV, after Juror No. 7 sent a note that he had seen the doctor on TV. Mr. Waco asked for a mistrial, which Judge Wiatt denied. (44RT 6569-6572.)

On July 7, 2000, Mr. Waco accused Judge Wiatt of refusing to allow him to review Dr. Ney's documents. Judge Wiatt stated, "That is not true." Judge Wiatt found none of the documents protected by any privilege. (45RT 6641.) Judge Wiatt overruled Mr. Waco's objection to the prosecution calling Dr. Amos to testify. (45RT 6643.) Judge Wiatt ordered counsel not to mention PET scans directly or indirectly. (45RT 6646.) During Mr. Waco's cross-examination of Dr. Caldwell, he was admonished by Judge Wiatt, in the presence of the jury, not to editorialize or make extemporaneous comments while examining the witness. (45RT 6679; see also 45RT 6661-6662, 6671.) Out of the presence of the jury, Judge Wiatt told Mr. Waco that his questions were inappropriate. Mr. Waco responded that the prosecutor had made speaking objections without comments from Judge Wiatt, and Judge Wiatt responded that he was addressing Mr. Waco's behavior. (45RT 6681-6682.) Judge Wiatt admonished the jury to disregard Mr. Waco's last comments, which involved his personal beliefs. (45RT 6683.) Judge Wiatt again admonished Mr. Waco, in front of the jury, not to interrupt Dr. Caldwell. (45RT 6704-6705.)

Outside of the presence of the jury, Judge Wiatt questioned Mr. Waco about his questioning of Dr. Caldwell and, under section 352 of the Evidence Code, would not permit further examination regarding books Dr. Caldwell considered. Mr. Waco complained of a headache and asked to take a break, but Judge Wiatt would not allow it, commenting that he himself had a headache and still kept on working. (45RT 6733-6736.)

Outside the presence of the jury, Judge Wiatt admonished Mr. Waco regarding asking Dr. Caldwell inappropriate questions. (45RT 6770-6772.) Judge Wiatt stated that "almost without exception" "everything" Mr. Waco had asked Dr. Caldwell about his report "was made in an effort to mislead this jury." (45RT 6792.) Judge Wiatt ended Mr. Waco's recross-examination of Dr. Caldwell. (45RT 6806-6807.)

Judge Wiatt allowed Mr. Waco to question Dr. Caldwell outside the presence of the jurors. But, after hearing Dr. Caldwell's answers, Judge Wiatt would not permit further inquiry. (45RT 6808-6810.) A hearing was held regarding the admissibility of Dr. Kaser-Boyd's testimony. Judge Wiatt ruled that Dr. Kaser-Boyd could be called as a prosecution witness. (19RCT 4783; 45RT 6815, 6817.)

Mr. Waco stated that Judge Wiatt's rulings consistently favored the prosecution, and that Judge Wiatt had gotten angry with Mr. Waco both in front of the jury and away from the jury. Judge Wiatt found Mr. Waco's comments about the court's alleged favoritism "bordering on contempt." (45RT 6821-6824.) Judge Wiatt discussed his discovery order from April 11, 1999. (45RT 6826-6828.) Deputy Public Defender Brock argued that Judge Wiatt's instruction blaming Mr. Waco for the two-week continuance had turned the jury against the defense. (45RT 6832-6834.) Mr. Brock argued that there has been a great deal of acrimony in this case, a good deal directed at Mr. Waco. (45RT 6836.) Mr. Brock further argued that "the discovery law in California clearly presupposes that if discovery is given up

and then a witness is not called, that discovery is not going to be able to be used against the defendant." (45RT 6838.) Mr. Brock told Judge Wiatt, "You're angry at me now." (45RT 6839.) Judge Wiatt stated he could have told the jury "we are taking a two week break," without telling them why. (45RT 6839-6840.) However, "I did not hear an objection." (45RT 6841.) After argument about Dr. Kaser-Boyd, Judge Wiatt found "even assuming there was a psychotherapist/patient privilege, and certainly an attorney/client privilege, the court finds that there was a waiver of that privilege when it was disclosed." Judge Wiatt ordered Dr. Kaser-Boyd back to testify for the prosecution. (45RT 6853-6854.)

On July 10, 2000, the prosecution stated it would not be calling Dr. Kaser-Boyd but would be calling Dr. Barrows as a rebuttal witness. Mr. Waco stated he was not prepared to cross-examine Dr. Barrows because he had not received any discovery on her. (46RT 6858.) The prosecution stated that this was false, Mr. Waco had received discovery on June 16th. Judge Wiatt overruled Mr. Waco's objection. During cross-examination of Dr. Barrows, Judge Wiatt informed Mr. Waco, out of the presence of the jury, of the court's intention to impose sanctions for making a gratuitous comment during cross-examination. Mr. Waco's request for a hearing and to be represented by counsel was granted. (19RCT 4788; 46RT 6887-6890.)

Fernando Nieves was called as a rebuttal witness. During cross-examination of him, Mr. Waco asked a series of questions calling for speculative answers, and drawing objections from the prosecution that were sustained by Judge Wiatt. (See 46RT 6926-6933.) Eventually, Judge Wiatt admonished the jury that they were not to assume to be true any insinuation suggested by a question asked of a witness. (46RT 6933-6934.) When Mr. Waco persisted in asking Fernando questions that called for speculation (46RT 6934-6935), Judge Wiatt asked the jury to go back to the jury room.

(46RT 6935.) Outside of the presence of the jury, Judge Wiatt ordered Mr. Waco to not ask further questions that called for speculation as to what appellant might have told Fernando. Furthermore, Judge Wiatt told Mr. Waco that it was misconduct for an attorney to state his or her personal belief about the evidence. (46RT 6936.) The following colloquy then occurred:

> Mr. Waco: With regards to the statements he made, as an offer of proof, I believe it's marked in evidence with regards to Susan Celentano and Alison Willis.
>
> The Court: That's a different subject matter. I am talking about the last colloquy. I will give you a chance to make an offer of proof when you're done with all the other questions on that issue about what may have been said at the hospital.
>
> Mr. Waco: I would like to take the opportunity, with the court's permission, to talk about that at this time.
>
> The Court: Not at this time. Let's buzz the jury back in.
>
> (The following proceedings were resumed in open court in the presence of the jury:)
>
> The Court: All jurors are present. The objection to the question is sustained.
>
> Mr. Waco: I have no further questions at this time, barring the offer of proof matter, Your Honor.
>
> The Court: Then why didn't you say that when the jury was out, Mr. Waco?
>
> Mr. Waco: I tried to, Your Honor.
>
> The Court: No, you didn't.

(46RT 6936-6937.) Outside of the presence of the jury, Mr. Waco objected to the trial court "making me look bad in front of the jury" and the court replied, "You're making yourself look bad." (46RT 6937-6938.) Mr. Waco was admonished in the presence of the jury, "no speaking

objections." (46RT 6955.) Outside the presence of the jury, Judge Wiatt found that Mr. Waco's request for a break so that Detective Taylor could get a tape was a delaying tactic and a waste of time, because there was no transcript of the tape. (46RT 6975.) Judge Wiatt would not allow Mr. Waco to re-call Detective Taylor to the witness stand. (46RT 6976.) Judge Wiatt expressed his belief that Drs. Ney and Humphrey were both liars, and if he were ever to comment on the evidence, this was the case where he would do so, but he had not commented on the evidence. (46RT 7005.) Judge Wiatt stated that he was strongly considering commenting on the evidence. (46RT 7006.)

On July 11, 2000, Judge Wiatt nunc pro tunc sanctioned Mr. Waco $1,100, for willfully violating a court order on numerous occasions without substantial justification. (19RCT 4792; 47RT 7054.) Judge Wiatt ordered Mr. Waco, in front of jury, not to cross-examine Dr. Sadoff about the "non-interview" with appellant. (47RT 7102.) Also in the presence of the jury, Judge Wiatt struck Mr. Waco's "editorial" comment during Dr. Sadoff's cross-examination and admonished the jury to disregard the comment. (47RT 7119.) Judge Wiatt admonished Mr. Waco, outside the presence of the jury, that he had violated the trial court's orders that there be no speaking objections. (19RCT 4800; 47RT 7119, see also 47RT 7171-7174.) That same day, the public defender's office filed an affidavit seeking the disqualification of Judge Wiatt. (19RCT 4801.)

There was a sanctions hearing on July 12, 2000, wherein Mr. Waco was represented by counsel, Terry Towery. Judge Wiatt issued sanctions against Mr. Waco, but stayed payment of the sanctions until August 18, pending further proceedings in the California Court of Appeal. (19RCT 4882; 48RT 7235-7254.)

Following this hearing, Judge Wiatt notified Mr. Waco that there would be a contempt hearing after the trial for his inappropriate laughter in

open court during the testimony of witness Edwin Amos. (19RCT 4883; 48RT 7308-7309.) Mr. Waco was admonished in front of the jury to stop shaking his head and laughing. (48RT 7316.) Judge Wiatt also found that Mr. Waco had made an insufficient offer of proof as to witnesses Susan Celentano and Allison Willis for purposes of impeaching Fernando Nieves. (48RT 7254-7259.) Mr. Waco objected to receiving discovery of a report by Dr. Scott Phillips, which the prosecution had received that morning, and also objected to discovery of appellant's medical records from jail. (48RT 7266.) Mr. Barshop stated that he had tried to "open it with counsel before, and he refused to do it. So that's why we're doing it now." (48RT 7266-7267.) Judge Wiatt overruled the objection. (48RT 7267.)

Outside the presence of the jury, the court warned Mr. Waco not to shake his head "no" whenever the court ruled against him. Also, Judge Wiatt noted that Mr. Waco had a chance to look at the medical records in advance, and had refused, and then objected in front of the jury as if he had never seen the records. (48RT 7293-7295.) Judge Wiatt also admonished Ms. Silverman, outside of the presence of the jury, not to laugh. (48RT 7351-7352.) Judge Wiatt sustained objections to hypothetical questions posed by Mr. Waco to Dr. Plotkin. (48RT 7381-7384, see also 7390.) Judge Wiatt admonished Mr. Waco, in the presence of the jury, not to make speaking objections. (48RT 7396.) Judge Wiatt told Mr. Waco, out of the presence of the jury, that he seemed unable to frame a proper hypothetical question. (48RT 7398.) Judge Wiatt admonished Mr. Waco, in front of jury, while he was questioning Dr. Plotkin, "you can't say that, and you're disobeying a lawful court order." (48RT 7410.)

On July 13, 2000, Judge Wiatt accused Mr. Waco, out of the presence of the jury, of "gameplaying" for not talking to Mr. Barshop about wanting to speak to Dr. Phillips. (49RT 7451.) Judge Wiatt admonished Mr. Waco, in front of the jury, for asking a "false and misleading" question of Dr.

Phillips, and the jury was instructed to disregard it. (49RT 7487.) Mr. Waco asked Judge Wiatt to review the notes Ms. Silverman took while interviewing Dr. Phillips, for which Ms. Silverman claimed work product. Judge Wiatt stated he would review those notes over the lunch hour. (49RT 7506-7505, 7509.) Judge Wiatt then changed his mind and stated that he accepted Ms. Silverman's representations that the notes were work product. (49RT 7510; see also 49RT 7585.)

In the presence of the jury, Judge Wiatt admonished Mr. Waco not to make speaking objections and not to shake his head when the court ruled against him. (49RT 7522.) Judge Wiatt told Mr. Waco, outside of the presence of the jury, that he would not give Mr. Waco any more guidance on how to formulate questions. (49RT 7539-7540.) Dr. Kaser-Boyd was ordered to bring her entire file to court the next day. (49RT 7590.) There was a discussion regarding the statement of disqualification filed by the defense against Judge Wiatt. Judge Wiatt ordered sanctions against Mr. Waco for conduct on July 10th and July 11th. (49RT 7592-7593.) Mr. Waco stated that he might declare a doubt as to appellant's competency if "her health deteriorates." Mr. Waco stated that appellant had been coughing and could not see a doctor because of her trial. A defense oral motion for mistrial was denied. The People rested on rebuttal. (19RCT 4885; 49RT 7530-7532.)

On July 14, 2000, Judge Wiatt signed an order for sanctions against Mr. Waco in the amount of $100 for violations of a court order on July 11, 2000, without good cause and substantial justification. (19RCT 4886.) Judge Wiatt ordered Mr. Waco to answer whether he objected to an attempted arson instruction, and if Mr. Waco refused to answer, the court would consider contempt proceedings. Mr. Waco responded that if the court wished to give it, he had no objection one way or the other. (50RT 7629-7630.) There was a discussion about whether appellant was on

suicide watch; Mr. Waco had made such comments to a newspaper, but apparently she was not on suicide watch. (50RT 7672-7675.) Mr. Waco stated that Ms. Silverman has been smirking and laughing and making faces during trial, but Judge Wiatt asked why Mr. Waco had not brought it up at the time it happened. (50RT 7677.) Mr. Waco stated he never endeavored to mislead the press. (50RT 7678.) During a discussion on whether Mr. Waco was declaring a doubt as to appellant's competence, Mr. Waco finally stated he was not declaring a doubt. (50RT 7679-7680.)

On July 17, 2000, there were no witnesses; there were further discussions on instructions. (51RT 7683-7734.) Judge Wiatt stated he might comment on the credibility of Drs. Humphrey and Ney. Mr. Waco countered that the court commenting on credibility would be judicial misconduct. (51RT 7739-7740.)

On July 18, 2000, Judge Wiatt continued the discussion on instructional issues. Mr. Waco complained that he did not have his instructions with him, because he had not anticipated that there would be any further discussion of instructions. Judge Wiatt refused the defense special instructions because they misstated the law and were not accurate. (52RT 7815.) Mr. Waco kept complaining that he did not have his instructions with him. (52RT 7817, 7819.)

Judge Wiatt suggested that Mr. Waco keep a copy of the instructions with him. Judge Wiatt excused Mr. Waco to go get his copy of the instructions. (52RT 7820.) Outside of the presence of the jury, Mr. Waco was instructed not to base hypothetical questions to Dr. Plotkin on facts outside the evidence. (52RT 7822.) Judge Wiatt would not permit Mr. Waco to question Dr. Plotkin about appellant having seizures when she was a teenager, because there was no "reliable" basis for that line of questioning. (52RT 7824.) During subsequent questioning of Dr. Plotkin, in front of the jury, Judge Wiatt told Mr. Waco he was violating the court's

order. (52RT 7827.) Judge Wiatt, further, overruled Ms. Silverman's objection to Dr. Plotkin looking at his notes as he testified. (52RT 7830.) Judge Wiatt also admonished Mr. Waco, in front of jury, not to make speaking objections or editorial comments. (52RT 7856.) After a series of prosecution objections were sustained regarding carbon monoxide poisoning and whether appellant could remember writing letters, there was a side bar; Judge Wiatt ruled that Mr. Waco had made an insufficient offer of proof and under Evidence Code section 352 the objections were sustained. (52RT 7869-7872.)

Under Evidence Code section 352, Judge Wiatt ordered Mr. Waco, in the presence of the jury, to move on and not ask any more questions about "CPK." (52RT 7879.) Mr. Waco was warned, outside the presence of the jury, not to make speaking objections. (52RT 7886.) Mr. Waco was told by Judge Wiatt to make an offer of proof as to any further questions to Dr. Plotkin, because the court was sustaining all of the People's objections. Judge Wiatt gave Mr. Waco 10 minutes to finish questioning Dr. Plotkin. (52RT 7890-7893.)

In the presence of the jury, Judge Wiatt terminated Mr. Waco's direct examination of Dr. Plotkin, based on the court's previous rulings. (52RT 7899.) Judge Wiatt again admonished Mr. Waco, outside the presence of the jury, about speaking objections, and then imposed monetary sanctions. Mr. Waco asked for a hearing with counsel. (52RT 7902-7903.) Judge Wiatt then sustained defense objections to Mr. Barshop's questions of Dr. Plotkin on cross-examination. Judge Wiatt also rephrased questions for Mr. Barshop. (52RT 7905-7907, 7911, 7916, 7921, 7923, 7976, 7979, 7981.) Judge Wiatt interrupted Mr. Barshop's questioning to ask Dr. Plotkin how to order an article on the Internet. Dr. Plotkin stated he was not familiar with how to order an article on the Internet. (52RT 7929.) Judge Wiatt observed, outside the presence of the jury, that Mr. Waco chose not to ask

appropriate questions. (52RT 7931.) Judge Wiatt continued questioning Dr. Plotkin, in the presence of the jury, about auras and "pub meds." (52RT 7982-7983, 8006-8007.) Judge Wiatt also questioned Dr. Plotkin about ordering Internet articles on Saturday. (52RT 8008-8009.) Judge Wiatt then stated that he had downloaded an article during lunch hour and handed it to Dr. Plotkin, in the presence of the jury. (52RT 8011.)

In the presence of the jury, Judge Wiatt also took judicial notice that July 13, 1998, was the first time the case was called in court for arraignment and at that time Mr. Waco appeared for appellant and was appointed as counsel. (52RT 8028.) Outside the presence of the jury, Mr. Waco objected to how Judge Wiatt phrased the judicial notice. (52RT 8030-8032.) There was a discussion regarding an involuntary manslaughter instruction prepared by the prosecution. Mr. Waco asked for CALJIC Nos. 8.45 and 8.47, involuntary manslaughter defined and involuntary manslaughter while unconscious due to voluntary intoxication. (52RT 8033-8034.) However, when Judge Wiatt asked Mr. Waco to discuss his theory on why the instructions were applicable, Mr. Waco was unable to state an articulate theory; he rambled on about "an unlawful act" involving setting the house on fire. (52RT 8035-8036.)

Judge Wiatt stated he would not instruct on involuntary manslaughter. (52RT 8037.) Mr. Barshop then interjected that, if Mr. Waco could not articulate a theory, he would do it for him: the involuntary manslaughter instructions were warranted based on a theory of "of criminal negligence; the criminal negligence being the drinking and the combination of the drugs and/or alcohol." (52RT 8037-8038.) The trial court stated that it would not give an involuntary manslaughter instruction based on an "unlawful" act. Mr. Waco then stated that he objected to the prosecution's involuntary manslaughter instruction. The trial court declined to give any instruction on involuntary manslaughter. (52RT 8039.) Judge Wiatt also refused a

defense instruction on the prosecution declining to conduct neurological testing of appellant. (52RT 8040.) Judge Wiatt refused the prosecution's instruction regarding how to consider appellant's refusal to be tested. (52RT 8043.)

On July 19, 2000, the jury received guilt phase instructions. (20RCT 4967-5004.) The defense filed an affidavit of disqualification in the matter of the sanctions against Mr. Waco. (20RCT 5005.) A hearing on sanctions was continued to July 28. (53RT 8054.) Mr. Waco stated that the prosecutors were laughing and smirking in court the day before during Dr. Plotkin's examination. (53RT 8056.) Mr. Barshop responded that he was laughing at himself for formulating an awkward question. Judge Wiatt stated he did not see anything improper. (53RT 8057-8059.)

Judge Wiatt observed to Mr. Waco "it almost seems like you're trying to inject error into this case." Judge Wiatt further stated "if there was ever a case in my experience that stood for a proposition that appellate courts have to give great deference to the trial court's ruling, this is the case, because if you read the sterile record in this case, you don't get the flavor of what Mr. Waco is trying to do." (53RT 8059; 8061.)

The cross-examination of Dr. Plotkin resumed. (53RT 8074.) Judge Wiatt sustained Mr. Waco's objection to Mr. Barshop's editorializing and argumentative questioning. (53RT 8076, 8089.) In the presence of the jury, Judge Wiatt ordered Mr. Waco not to shake his head when he was ruled against. (53RT 8092.) Judge Wiatt interrupted Mr. Barshop's questioning as argumentative and vague. (53RT 8094, 8100.) Judge Wiatt also sustained Mr. Waco's objection to Mr. Barshop's questions as vague, and asked and answered. (53RT 8095, 8114.) Judge Wiatt further sustained his own objection to a compound question asked by Mr. Barshop. (53RT 8116-8117.) Outside the presence of the jury, Mr. Waco complained that Ms. Silverman had been smirking; Judge Wiatt responded,

"not true." (53RT 8119.) Judge Wiatt then admonished Dr. Plotkin, outside the presence of the jury, not to argue with the court, and admonished the jury that Dr. Plotkin had not been limited in explaining his answers. (53RT 8119-8120.) Mr. Waco was admonished, in the presence of the jury, not to make speaking objections. (53RT 8128.)

Judge Wiatt also sustained Mr. Waco's objection to a question as "ambiguous." (53RT 8130-8131.) Judge Wiatt asked Mr. Waco how much longer he would be questioning Dr. Plotkin on redirect. Mr. Waco stated he could not finish that morning, and the court said, "maybe if you get to some questions that are proper, you might finish sooner rather than later." This exchange occurred in the presence of the jury. (53RT 8163.) Mr. Waco objected to the court "continually" admonishing him in front of jury regarding his questioning. (53RT 8165.) Mr. Waco accused Judge Wiatt of "playing an advocate for the prosecution," to which Judge Wiatt responded that Mr. Waco was engaging in "tactics" and "game-playing." (53RT 8166-8167.) Judge Wiatt ordered Mr. Waco, under Evidence Code section 352, to move on in his questioning of Dr. Plotkin. (53RT 8182, 8193.) The defense finally rested. (53RT 8223.)

On July 20, 2000, Mr. Waco asked Judge Wiatt to reconsider his ruling on instructions on involuntary manslaughter. The prosecutors accused Mr. Waco of playing a game and inviting error because the People first offered the instruction, Mr. Waco objected, and now Mr. Waco was asking for the instruction. Judge Wiatt stated he would not change his prior ruling. (54RT 8270-8271.) Mr. Waco stated he might have further surrebuttal, but was unable to contact Drs. Gold or Mandelkern; Mr. Waco asked for a continuance, which was denied. (54RT 8333.) Further, based on Mr. Waco's offer of proof, Judge Wiatt would not allow Dr. Plotkin to testify in further rebuttal. (54RT 8335-8337.) Edwin Amos was recalled to testify for the prosecution on further rebuttal. Judge Wiatt then instructed

the jury. (20RCT 5065-5066; 54RT 8339-8394.) Mr. Barshop began his opening argument. (54RT 8401-8461.)

On July 24, 2000, Mr. Waco stated that he had an objection to Mr. Barshop's opening argument when Mr. Barshop asked the jury to convict appellant on behalf of the children. Judge Wiatt ruled that the objection was untimely and waived. (55RT 8477-8479; see also 8703-8705.) Mr. Waco began his closing argument. (55RT 8485-8488.) Various prosecutorial objections were sustained based on Mr. Waco misstating the evidence and making improper arguments. (55RT 8489-8547, 8549-8584, 8587-8632.)

On July 25, 2000, Mr. Waco's closing argument concluded with more prosecutorial objections to improper arguments, and admonishments by Judge Wiatt outside the presence of the jury. (56RT 8638-8697.) Ms. Silverman began closing argument. (56RT 8708- 8811.)

On July 26, 2000, Ms. Silverman concluded her closing argument. (57RT 8842-8897, 8935-8939.) Judge Wiatt instructed the jurors. (57RT 8939-8945.) There was an in chambers proceeding involving defense intern Gabe Silvers, who alleged he heard two jurors make inappropriate comments about "Mexicans." Judge Wiatt questioned Juror Number 5 and Alternate Juror Number 2. Judge Wiatt concluded that the jurors did not say anything that affected their ability to be fair and impartial in this case. Mr. Waco disagreed. (57RT 8902-8922.) Outside of the presence of the prosecutors, there was a hearing regarding section 987.9 authorization for appointment of Dr. Mandelkern and the UCLA nuclear medicine clinic. Defense counsel, Mr. Fisher, requested another PET scan of appellant. Judge Wiatt stated that Mr. Waco's motion to reconsider the court's ruling on the PET scan was still pending as to the penalty phase. (57RT 8967-9970.) Mr. Fisher requested a transportation order to have appellant transported to UCLA for a PET scan. Judge Wiatt observed that the

prosecutors needed to be involved in appellant's efforts to get another PET scan. (57RT 8972.) Mr. Fisher objected to the prosecution being notified about efforts for another PET scan. (57RT 8973.) Judge Wiatt expressed concern that another PET scan would result in a lengthy continuance, which meant losing jurors and possibly the penalty phase. Mr. Fisher claimed the attorney/client privilege and the work product privilege as to the second PET scan authorization. (57RT 8974.) Judge Wiatt stated that he would not tell the prosecution team that the defense was getting another expert. (57RT 8975.)

At a further hearing, Mr. Fisher argued that the PET scan was admissible as Factor K evidence (sympathy factor) for the penalty phase. (57RT 8980-8985.) The People argued against admission under Factor K and Evidence Code section 352. (57RT 8986.) Judge Wiatt ruled the evidence was inadmissible at the penalty phase, citing Evidence Code section 352. (57RT 8987-8988.) Judge Wiatt found no good cause for a continuance. (57RT 8991.) Referring to the April 11th discovery order, Judge Wiatt stated "it seems to me perhaps Mr. Waco is deliberately setting up another potential error" by not disclosing potential penalty phase witnesses, leading to the sanction of exclusion. (57RT 8992.) Mr. Waco then supplied the names of potential penalty phase witnesses. (57RT 8995-8996.)

Mr. Waco stated he would check whether there were any witness statements he had not provided. (57RT 8998.) Mr. Waco further moved for a mistrial due to Judge Wiatt's failure to allow PET scan evidence. Judge Wiatt denied the mistrial motion. (57RT 9002.) In an in camera hearing with defense counsel only, the defense request for a transportation order to UCLA for MRI and PET scans was denied as speculative. Further, there was no good cause for a continuance. Judge Wiatt found a lack of due diligence. (57RT 9004-9013.)

On July 27, 2000, the jury convicted appellant as charged. (20RCT 5138-5144; see 58RT 9026-9032.) Later that day, Mr. Waco handed over to the prosecution discovery in the form of penalty phase witness statements. (58RT 9040-9041.) Judge Wiatt also denied Mr. Waco's motion for reconsideration of PET scan evidence, ruling the evidence was not admissible at the penalty phase, based on *Kelly-Frye,* relevancy, and Evidence Code section 352. (58RT 9042.)

On July 28, 2000, appellant refused to leave her cell and Judge Wiatt ordered a "cell extraction or any other means to get her to court." (58RT 9046-9047, see also 9105.) Mr. Waco turned over additional discovery material and his motion for special transportation for appellant was argued and denied. (20RCT 5255; 58RT 9059, 9064-9065.)

Mr. Waco argued he had not tried to hide the ball from the prosecution. (58RT 9070.) The prosecutors argued against PET scan evidence coming in as Factor K evidence in the penalty phase, and noted that the court had already excluded PET scan evidence under *Kelly/Frye.* (58RT 9073.) Mr. Waco accused Judge Wiatt of chasing Dr. Humphrey from the court room by suggesting she come back with a lawyer. (58RT 9075.)

Judge Wiatt reiterated that the PET scan evidence was inadmissible at the guilt phase and that he did not limit his ruling to the guilt phase only. Judge Wiatt further found "not a shred of evidence in this case that your client has any kind of a brain abnormality." (58RT 9077-9078, 9083.) Judge Wiatt also found Dr. Ney utterly lacked credibility and that he "clearly lied." (58RT 9080.) Additionally, Judge Wiatt found Mr. Waco failed to comply with the court's discovery orders as to proposed penalty phase witness Mulder. (58RT 9086.)

The prosecutors stated that they were unaware of proposed penalty phase witnesses Mulder, North, Pearce and Driskell before July 27, 2000.

(58RT 9088.) Mr. Waco was ordered to turn over to the prosecution the addresses and phone numbers of proposed defense witnesses Mrotzek and Jones, both of whom were members of the clergy. (58RT 9104.) Judge Wiatt ordered the sheriff's department to take all appropriate measures to ensure appellant got on the regular bus each morning. (58RT 9110.) Judge Wiatt noted that if appellant wanted to play games, the games would come back to haunt her. (58RT 9111.) Mr. Waco quoted the record to the court about reconsidering the PET scan ruling at the penalty phase. Judge Wiatt responded that Mr. Waco's interpretation of the record was "warped." (58RT 9112.) There was a hearing regarding possible sanctions for Mr. Waco's discovery violations. (58RT 9118.) Judge Wiatt and defense counsel, Terry Towery, argued. (58RT 9120-9121.)

Judge Wiatt stated that Mr. Waco appeared to have willfully disobeyed the discovery statute and court order and he would proceed with contempt sanctions because monetary sanctions had no effect on Mr. Waco. (58RT 9122-9123, 9127.) Judge Wiatt's findings were based on his observations and on the April 11th discovery order. Judge Wiatt stated he would not exclude penalty phase evidence but would instruct the jury with CALJIC No. 2.28 on untimely disclosure. (58RT 9125.) Mr. Waco was ordered to give discovery (names, addresses, phone numbers) of all penalty phase witnesses on the record. (58RT 9129-9132.) The prosecution also provided a list of witnesses on the record. (58RT 9133-9141.) Mr. Waco asked for witnesses statements, but the prosecution stated they had no witness statements because the witnesses would offer only victim impact testimony. Mr. Waco then demanded sanctions against the prosecution because they had not provided statements from the victim impact witnesses. (58RT 9142.)

On July 31, 2000, Mr. Waco alleged that the prosecution committed discovery violations by failing to turn over victim impact statements.

(59RT 9164.) Mr. Waco wanted the prosecution sanctioned for not providing witness statements. (59RT 9166.) Mr. Waco further objected to admission of victim impact evidence. (59RT 9171-9174.) Judge Wiatt overruled the defense objection to victim impact evidence. (59RT 9176-9177.) Judge Wiatt again told Mr. Waco that the PET scan evidence was inadmissible. (59RT 9179.) Mr. Waco complained that his doctors were not allowed to fully express themselves. (59RT 9181.) Mr. Barshop stated his intent to call Fernando and Charlotte Nieves, Dave Folden, and Minerva Cerna to provide victim impact evidence. (59RT 9184-9185.) Judge Wiatt overruled defense objections to Dave Folden and Fernando Nieves. (59RT 9189.)

Mr. Barshop turned over discovery, consisting of Riverside County court documents signed by appellant in August 1998. The documents were for impeachment of defense witnesses if they testified about appellant's character. (59RT 9234.) Judge Wiatt ordered Dr. Kaser-Boyd to be in court on Friday, which would trigger disclosure of discovery to the prosecution. (59RT 9236.) Mr. Waco at first refused to turn over discovery on Dr. Kaser-Boyd, but after Judge Wiatt threatened to exclude her testimony, Mr. Waco handed over discovery on Kaser-Boyd. (59RT 9237-9238.) Judge Wiatt excluded victim impact evidence from the children's teachers or Alethea Volk. (59RT 9239-9241.)

On August 1, 2000, the prosecution and defense counsel gave opening statements in the penalty phase. (21RCT 5269.) Mr. Waco objected to posters with photos of the children while they were alive, with captions like "fun times together" and "in remembrance." (60RT 9258-9260.) Mr. Waco requested the jury be shown the original version of a family video that the prosecution would be showing. Mr. Waco objected to the "skewed" version that deleted appellant from the video. (60RT 9260-9261.) Judge Wiatt overruled Mr. Waco's objections to the photographs

and the video. (60RT 9264.) Judge Wiatt sustained Mr. Waco's objection to inappropriate argument by Mr. Barshop. (60RT 9268-9269.) Judge Wiatt sustained the prosecution's objections to Mr. Waco's opening statement based on improper argument. (60RT 9270-9272, 9275.) Judge Wiatt then interrupted Mr. Waco's opening statement and ordered the jury out. (60RT 9275.) Judge Wiatt ordered Mr. Waco not to argue in his opening statement or else the court would cut it short. (60RT 9276-9277.) Mr. Waco continued his opening statement. (60RT 9277.) There were more prosecution objections to Mr. Waco's improper argument, which Judge Wiatt sustained. (60RT 9277-9278, 9280-9281.) Mr. Waco was warned, in front of the jury, that Judge Wiatt would terminate Mr. Waco's opening statement if he continued to make improper arguments. (60RT 9281-9282.) Fernando Nieves testified. While cross-examining Fernando, Mr. Waco interrupted his answer, prompting Judge Wiatt to admonished him, outside the presence of the jury. Judge Wiatt threatened Mr. Waco with contempt proceedings if he continued to interrupt Fernando. (60RT 9355-93566.) Judge Wiatt ordered Mr. Waco to have Dr. Kaser-Boyd in court Friday morning to testify. (60RT 9429.) In an in camera hearing outside the presence of the prosecution, a defense motion for transportation of appellant for MRI and PET scans was heard and denied. (60RT 9381-9391.)

On August 2, 2000, during redirect examination of Charlotte Nieves, Mr. Waco was ordered by Judge Wiatt, in the presence of the jury, to not make speaking objections. (61RT 9459.) During recross-examination of Charlotte, Mr. Waco made a comment after she had finished giving an answer.[13] (61RT 9460.) Outside the presence of the jury, Judge Wiatt

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[13] The colloquy was as follows:

(continued...)

ordered defense counsel Terry Towery to be present the next day for a contempt hearing, based on Mr. Waco violating a lawful court order against speaking objections. When Mr. Waco offered an explanation for his comment, Judge Wiatt warned Mr. Waco that he had the privilege against self-incrimination and anything he said could be used against him. (61RT 9462-9463.) In the presence of the jury, Judge Wiatt admonished the jurors that Mr. Waco's comment was stricken and to be disregarded. (61RT 9464.) The prosecution rested. Judge Wiatt ordered Mr. Waco to be prepared with his first witness, and denied the prosecution request for an Evidence Code section 402 hearing on defense witness Shirley Driskell. (61RT 9467.)

Outside of the presence of the jury, Mr. Barshop stated that Mr. Waco was laughing and smiling; Judge Wiatt told Mr. Waco to stop acting like a clown. Judge Wiatt observed that Mr. Waco was giving one of the most unprofessional performances he had ever seen. Mr. Waco was warned not to ask questions in bad faith. (61RT 9468-9469.) Judge Wiatt overruled the prosecution's objection to defense exhibits consisting of cards and writings from the children expressing love for appellant. (61RT 9524; see also 9536.) Mr. Waco wanted to question witnesses, under Factor K, about how they felt about appellant as a person, but Judge Wiatt stated that Mr. Waco's questions were too broad. (61RT 9525.)

(...continued)

Q Do you have the original letter that she sent you in Germany?

A Yeah.

Q Where is it?

A I gave it to the District Attorney.

Q We only have a Xerox here.

THE COURT: All right. I am going to ask the jury to go back in the jury room and disregard that statement.

(61RT 9461.)

Mr. Waco cited *Skipper v. South Carolina* (1986) 476 U.S. 1 [106 S.Ct. 1669, 90 L.Ed.2d 1], for the proposition that evidence of a person's character through a lay witness was appropriate. Judge Wiatt agreed, but added, "It's the way you frame the question" as to why he sustained the prosecution's objections. (61RT 9572.) Judge Wiatt refused to accept Mr. Waco's statement that one of his witnesses saw a juror reading a paper with articles regarding appellant. (61RT 9578.)

On August 3, 2000, following Shirley Driskell's testimony on behalf of appellant, Judge Wiatt stated he was excluding Ms. Driskell from the court room because she was making faces and because she was subject to further recall after her father testified. (62RT 9645.) When Mr. Waco objected the none of the prosecution's witnesses had been excluded from the court after testifying, Judge Wiatt stated that Mr. Waco was lying. Judge Wiatt stated that only the immediate family members had been allowed to stay in the courtroom after testifying because their children were the victims. (62RT 9647.) Judge Wiatt stated that defense witness Dr. Boone was being excluded because her testimony was cumulative and would involve undue consumption of time. (62RT 9647-9648.)

Judge Wiatt sustained the prosecution's objection to Carl Hall being asked his opinion as to Fernando Nieves' reputation for honesty in the community and his personal opinion about Fernando's reputation. Mr. Waco was admonished in front of the jury not to shake his head and not to make faces. Mr. Waco denied making faces, but Judge Wiatt stated, "Yes, you were." (62RT 9653.) Outside of the presence of the jury, Carl Hall was admonished by Judge Wiatt to only answer questions yes or no, or face contempt proceedings. (62RT 9660.) Mr. Waco asked if he had permission to ask Mr. Hall about his opinion regarding Fernando's truthfulness and honesty. (62RT 9661.) Judge Wiatt questioned Mr. Hall outside the presence of the jury. (62RT 9662.)

Based on Mr. Hall's answers, Judge Wiatt ruled that Mr. Waco could not question Mr. Hall further about Fernando's truthfulness, because Mr. Hall lacked firsthand knowledge. (62RT 9663.) Judge Wiatt informed the jury that Mr. Hall had been admonished "not to get anything else before the jury that was not responsive to the question." (62RT 9664.) Mr. Waco was again warned, in the presence of the jury, not to make speaking objections. (62RT 9666.) Judge Wiatt strongly admonished Mr. Hall for answering questions when an objection had been made. (62RT 9666-9667.)

During cross-examination of Lenora Frey, Mr. Waco objected to comments by Ms. Silverman. Judge Wiatt sustained the objection and admonished the jury to ignore the comment. (62RT 9692.) Judge Wiatt told Ms. Silverman to let the witness answer the question. (62RT 9698.) Judge Wiatt also told Ms. Silverman to move on in her questioning of Ms. Frey, as it was becoming cumulative. (62RT 9715.) Judge Wiatt further sustained Mr. Waco's objection that Ms. Silverman's questioning was argumentative. (62RT 9719.) Ms. Silverman's request that Ms. Frey remain on call was denied. Judge Wiatt ordered Ms. Frey to be excused, subject to recall. (62RT 9721-9722.) Judge Wiatt sustained Mr. Waco's objection to argumentative questions asked by the prosecution to Cindy Hall. (62RT 9733-9736.) Judge Wiatt sustained defense objections to questions as asked and answered and on hearsay and conclusion grounds. (62RT 9741, 9748-9749.)

During direct examination of Al Lucia, Judge Wiatt warned Mr. Waco to "stop asking improper questions." (62RT 9754.) On cross-examination, Judge Wiatt sustained a defense objection and struck the answer. (62RT 9755.) Judge Wiatt sustained defense objections to the prosecution's questions to Dr. Suiter. (62RT 9785-9787.) Outside the presence of the jury, Judge Wiatt ordered Mr. Barshop to confine his examination of Dr. Suiter to what appellant said and to get on with it because the jury was tired

of hearing evidence. (62RT 9788, 9790.) Judge Wiatt reminded Mr. Waco that he had the right to control proceedings as to the order of witnesses. Judge Wiatt then ordered Mr. Waco to tell the prosecution everything he had on Kaser-Boyd. (62RT 9796-9798.) Judge Wiatt would not allow Mr. Waco to ask Dr. Suiter further questions on Dr. Caldwell's rescoring of Dr. Suiter's MMPI-2. (62RT 9819-9822.) Judge Wiatt again told Mr. Waco that he had an obligation to control the proceedings and make good use of court time. (62RT 9825.) Judge Wiatt demanded that Mr. Waco make a decision about calling Dr. Kaser-Boyd, but Mr. Waco stated he would make a decision the following day. (62RT 9826.) Judge Wiatt ordered Dr. Kaser-Boyd to be present the next day with her entire case file. (62RT 9828, 9833.) Mr. Waco objected that he had a right to choose the order of his witnesses. (62RT 9835.)

On August 4, 2000, Dr. Kaser-Boyd was present in court, but Mr. Waco stated he did not want to call her as his first witness. Judge Wiatt stated that if Dr. Kaser-Boyd did not testify at 10:00 a.m., then she would not testify. Mr. Waco refused to turn over Dr. Kaser-Boyd's reports until he decided if she would testify. Judge Wiatt ordered Dr. Kaser-Boyd to remain in court in case Mr. Waco decided to call her. (63RT 9840-9843.) Mr. Waco stated there was a possibility he would call Dr. Kaser-Boyd as a witness, but not his first witness. Judge Wiatt stated he would provide the prosecution with a redacted version of the discovery Mr. Waco filed with the court. Mr. Waco objected that disclosure to the prosecution would violate appellant's constitutional rights. (63RT 9846.)

Judge Wiatt stated that Mr. Waco was playing a game of legal brinkmanship: "where you're going to call her later on, and if I don't let you do it, you're going to claim you have a right to present a defense. If I disclose the records now, you're probably not going to call her, and then claim that they received privileged documents." (63RT 9847.) Mr. Waco

ultimately decided not to call Dr. Kaser-Boyd and the defense rested. (63RT 9895-9896.) Judge Wiatt informed the prosecution that he would not grant any delays for rebuttal witnesses. (63RT 9900.) There was a discussion regarding CALJIC No. 2.28, regarding delays. Judge Wiatt adopted the instruction. (63RT 9911, 9961-9965.) Fernando Nieves was called as a prosecution rebuttal witness. During cross-examination of Fernando, Mr. Waco was cited for contempt, in front of the jury, for commenting on the evidence. Judge Wiatt admonished the jury to ignore the comment. (63RT 9930.) Out of the presence of the jury, Judge Wiatt told Mr. Waco that he must state a grounds for an objection; if he just "objects" then the court did not know on what basis, and that was why Judge Wiatt sometimes overruled Mr. Waco's objections. (63RT 10004.)

On August 7, 2000, the evidence portion of the penalty phase concluded. (21RCT 5374.) Judge Wiatt instructed the jury about appellant's failure to timely disclose evidence regarding defense witnesses. (64RT 10078-10079.) The prosecution began closing argument. (64RT 10095-10129.) Mr. Waco objected several times to the prosecutor's argument as improper personal opinion; Judge Wiatt overruled the objections. (64RT 10122, 10128, 10130-10131.) Mr. Waco's objection to the prosecutor's argument that there was no evidence of appellant's mental state was overruled. (64RT 10132-10133.) Mr. Waco began his closing argument. (64RT 10134-10171.) The prosecutor's many objections were sustained (64RT 10136, 10160, 10164, 10166, 10168), but not all (64RT 10169). Judge Wiatt stated that Mr. Waco's argument was improper in many instances where the prosecution had not objected. (64RT 10172.)

On August 8, 2000, there was further discussion about instructing the jury regarding Mr. Waco's improper argument. (65RT 10182-10186, 10189-10191.) Judge Wiatt stated he would instruct the jury that Mr. Waco had made an inappropriate argument; Mr. Waco objected. (65RT 10192.)

Judge Wiatt instructed the jury about Factor K evidence and Mr. Waco's misstatements. The jury was told to disregard Mr. Waco's argument that they had not heard all of the evidence. (65RT 10195-10197.) The jury received concluding instructions, including that the court had not intended to indicate that it believed or disbelieved a witness. (65RT 10197-10205; 21RCT 5403-5419.) The jury began deliberations. (65RT 10207.)

On August 9, 2000, the jury returned a verdict of death. (65RT 10217; 21RCT 5420.)

C. Applicable Law

The Penal Code authorizes the trial court to control the proceedings during trial and to limit the introduction of evidence and the argument of counsel to relevant material matters for the expeditious, effective ascertainment of the truth. (§ 1044.) To this end, the California Constitution permits the trial court to comment on the evidence, the testimony and the credibility of witnesses to the extent deemed necessary for the proper determination of the cause, but the court's comments must be accurate, temperate, non-argumentative and scrupulously fair. (*People v. Proctor* (1992) 4 Cal.4th 499, 541-542.) "The propriety and prejudicial effect of a particular comment are judged both by its content and by the circumstances in which it was made." (*People v. Melton* (1988) 44 Cal.3d 713, 735.) Also, the trial court acts within the scope of its duty when refusing to allow improper questions to be answered, even when no objection is interposed. (*People v. Clark* (1992) 3 Cal.4th 41, 144.)

Additionally, while counsel is entitled to disagree with the trial court's ruling, counsel must respect that ruling. (*Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 126.) The United States Supreme Court recognized this basic tenet as necessary for the orderly administration of justice:

> We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. If a

> person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal....

(*Maness v. Meyers* (1975) 419 U.S. 449, 458 [95 S.Ct. 584, 42 L.Ed.2d 574].)

While the High Court acknowledged counsel may object to a ruling or order by a court, counsel should not engage the court in extended discussion once a ruling is made. (*Id.* at p. 459; *Hawk v. Superior Court, supra*, 42 Cal.App.3d at p. 126.) Counsel has a duty to "maintain the respect due to the courts of justice and judicial officers" (Bus. & Prof. Code, § 6068, subd. (b)), and violates that duty when he or she disobeys a lawful order of the court in contempt of the authority of the court (Code Civ. Proc., § 1209, subds. 3, 5).

> "Although the trial court has both the duty and the discretion to control the conduct of the trial (*People v. Fudge* [(1994)] 7 Cal.4th [1075,] 1108), the court 'commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution' (*People v. Carpenter* (1997) 15 Cal.4th 312, 353). Nevertheless, '[i]t is well within [a trial court's] discretion to rebuke an attorney, sometimes harshly, when that attorney asks inappropriate questions, ignores the court's instructions, or otherwise engages in improper or delaying behavior.' (*United States v. Donato* (D.C. Cir. 1996) [321 U.S. App. D.C. 287] [99 F.3d 426, 434].) Indeed, '[o]ur role ... is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial.' (*United States v. Pisani* (2d Cir. 1985) 773 F.2d 397, 402.)" (*People v. Snow* (2003) 30 Cal.4th 43, 78 (*Snow*).)

(*People v. McWhorter* (2009) 47 Cal.4th 318, 373.) The failure to raise an objection below on the grounds asserted on appeal, and to seek a jury admonition regarding any of the alleged instances of judicial intemperance,

results in a forfeiture of the issue for appellate review. (*Ibid.*) "However, a defendant's failure to object does not preclude review 'when an objection and an admonition could not cure the prejudice caused by' such misconduct, or when objecting would be futile." (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237.) On review, a court should not speculate that the trial court would have refused to correct any error if given the opportunity to do so. (See *People v. Melton, supra*, 44 Cal.3d at p. 735.)

"[A] trial judge must rule on countless objections, and a simple numerical tally of those sustained and overruled, one which here favors the government, is not enough to establish that the scales of justice were tipped against a defendant. Of far greater importance is the correctness and fairness of the judge's evidentiary rulings." (*United States v. Pisani* (2d Cir. 1985) 773 F.2d 397, 402.) "[A] trial judge need not sit like 'a bump on a log' throughout the trial. He has an active responsibility to insure that issues are clearly presented to the jury." (*Id.* at p. 403.) Moreover, a trial judge does not commit misconduct by acting on a hunch and conducting Internet searches. *United States v. Bari* (2d Cir. 2010) 599 F.3d 176, 181. Claims of judicial hostility should be considered in context and in light of the entire record to determine whether the trial court's comments "betray a bias against defense counsel ...." (*People v. Wright* (1990) 52 Cal.3d 367, 411.)

Given the fast-moving nature of a trial, the trial court may admonish or reprimand defense counsel in front of the jury if defense counsel defies the authority of the court in the presence of the jury. (*People v. Chong* (1999) 76 Cal.App.4th 232, 244.) The court in *Chong* acknowledged:

> [I]t is vital to the integrity of our adversary legal process that attorneys strive to maintain the highest standards of ethics, civility, and professionalism in the practice of law. In order to instill public confidence in the legal profession and our judicial

> system, an attorney must be an example of lawfulness, not lawlessness.
>
> Accordingly, an attorney, "however zealous in his client's behalf, has, as an officer of the court, a paramount obligation to the due and orderly administration of justice...." [Citations.] An attorney must not willfully disobey a court's order and must maintain a respectful attitude toward the court. [Citation.]
>
> When, during the course of trial, an attorney violates his or her obligations as an officer of the court, the judge may control the proceedings and protect the integrity of the court and the judicial process by reprimanding the attorney. [Citations.]
>
> [¶] ... [¶]
>
> In fact, to allow an attorney to engage in unprofessional conduct before the jury without a prompt and strong response from the court undermines the judicial process. If, without rebuke, an attorney does not show proper respect for the judge and the proceedings, how can a juror be expected to do so? If an attorney is permitted to flout a court's ruling, how can a juror be expected to adhere to the rule of law as instructed by the court?

(*People v. Chong, supra*, 76 Cal.App.4th at pp. 243-244.) The appellate court in *Chong* further noted the trial court's admonishments to the jury not to consider anything the trial court had said or done as intending to intimate or suggest what the jury should find to be the facts; that is, the jury needed to form its own opinions. (*Id.* at pp. 244-245.)

D. The Trial Court Did Not Show Bias against Appellant, But Was Instead Trying to Control the Proceedings

Appellant contends that Judge Wiatt showed a "rare bias and prejudice that is not often encountered in California courtrooms." (AOB 51-52.) To the contrary, the judge struggled mightily to control the proceedings in the face of a defense strategy that combined "anything goes" with "nothing to lose." (Cf. generally *Knowles v. Mirzayance, supra*, 129 S.Ct. at pp. 1419, 1420 [rejecting "nothing to lose" standard of review for ineffective assistance of counsel claims].) That is, to quote defense

counsel, "I would rather be called an incompetent counsel than have my client get the death penalty" (34RT 4690), and so defense counsel embarked on a strategy of ignoring the rules of discovery and evidence, because in the face of the overwhelming evidence of his client's guilt and lack of mitigating evidence, neither he nor she had anything to lose. And, while appellant's argument focuses on demonizing Judge Wiatt, the record indicates that Mr. Waco similarly accused another judge, the Honorable Ronald Coen, of assisting the prosecution and of having "past conflicts." (7CT 2086-2088, 2090.) Another judge told Mr. Waco that his arguments were "just ridiculous." (2RCT 206.) It thus appears that Mr. Waco was determined from an early date to accuse, argue, and alienate any judge he appeared before. Judge Wiatt was therefore not uniquely biased against Mr. Waco. Rather, Judge Wiatt bore the brunt of Mr. Waco's undeclared war on the judiciary.

1. Disparagement of Defense Counsel

Appellant contends that Judge Wiatt's disparagement of Mr. Waco was similar to the disparaging comments made by the judge in *Offutt v. United States* (1954) 348 U.S. 11 [75 S.Ct. 11, 99 L.Ed.2d 11]. (AOB 53.) Appellant overreaches in her comparison. During a comparatively short 14-day trial the judge in *Offutt* threatened, in the presence of the jury, to "stick a gag" in the mouth of defense counsel and further stated "you have forfeited your right to be treated with the courtesy that this Court extends to all members of the Bar." (*Offutt, supra*, 348 U.S. at 16, fn. 2.) In contrast, the trial here lasted for months, and Judge Wiatt never engaged in the sort of thuggish remarks made by the trial judge in *Offut.*

There were, however, times when Judge Wiatt refused to sit like a "'bump on a log'" during Mr. Waco's shenanigans. In context, those times when the judge seemed to speak intemperately cannot be judged by the cold record alone. As Judge Wiatt observed to Mr. Waco "it almost seems like

you're trying to inject error into this case." Judge Wiatt further stated "if there was ever a case in my experience that stood for a proposition that appellate courts have to give great deference to the trial court's ruling, this is the case, because if you read the sterile record in this case, you don't get the flavor of what Mr. Waco is trying to do." (53RT 8059, 8061.)

Thus, for instance, appellant contends that Judge Wiatt disparaged Mr. Waco in front of the jury when, after sustaining several prosecution objections for argumentative opening statements, Judge Wiatt chided Mr. Waco for stating that the "evidence will show that some of us have demons to overcome, just like Sandi." Judge Wiatt asked, "You're going to present evidence of a demon?" to which Mr. Waco responded that he meant it "figuratively." (AOB 55, citing 15RT 1446-1447.) While appellant calls this exchange "disparagement," it is impossible to know what Judge Wiatt's tone of voice was from the cold transcript. Similarly, appellant categorizes Judge Wiatt's comments as "sarcastic" when he sustained a prosecution objection during the testimony of paramedic Bruce Alpern and stated "he's not qualified to testify as to whether somebody has a sound mind or not." (AOB 56, citing 16RT 1534.) There is nothing about this comment that jumps out as "sarcastic." The comment, at least on the cold page, seems even-handed and calm. Further comments by Judge Wiatt -- such as telling Mr. Waco to look at a tag on an exhibit for a "clue" or striking comments by Mr. Waco because they amount to testifying before the jury - were appropriate comments based on events, and hardly dripping with sarcasm. (See AOB 56, citing 16RT 1562, 1566-1567.)

Appellant goes on for page after page, citing instances of alleged "disparagement" of Mr. Waco by Judge Wiatt. (AOB 57-73 [examples of disparagement before guilt phase jury]; 73-75 [examples of disparagement before penalty phase jury]; 76-77 [examples of disparagement outside the presence of the jury]; 77-88 [disparagement while imposing sanctions and

during sanctions and contempt hearings].) But, as Judge Wiatt observed more than once, it seemed as though Mr. Waco was purposely trying to inject error into the case by his seeming incapability of following the court's simplest orders or even being able to ask proper questions. For example, while cross-examining David, Mr. Waco attempted to show David a calendar, without first showing it to the prosecution. Judge Wiatt told Mr. Waco to show it to the prosecution, but Mr. Waco persisted in trying to show the document first to David. Finally, in frustration, Judge Wiatt said, "You don't listen, do you?" (21RT 2452.) While harsh, this comment was well within the court's discretion, given Mr. Waco's improper behavior. (*People v. McWhorter, supra*, 47 Cal.4th at p. 373.) Similarly, Judge Wiatt banged his gavel as a means of controlling the proceedings when Mr. Waco and a witness were talking over each other -- not out of anger, as Mr. Waco complained (41RT 5922). (See *United States v. Pisani, supra*, 773 F.2d at p. 403.)

At the time of the instant trial, Mr. Waco was the most senior deputy public defender in Los Angeles County and had been a deputy public defender since 1965. (22RT 2707.) Yet, Mr. Waco seemed incapable of following a court order not to make speaking objections. Or, perhaps Mr. Waco was simply unwilling to follow the court's order, as a calculated move on his part to inject error into this case. Mr. Waco was first warned on May 17, 2000, not to make speaking objections. (21RT 2510.) Nonetheless, from that date onwards, Mr. Waco continually ignored the court's order. (See, e.g., 22RT 2680-2682, 2693; 23RT 2737, 2749, 2798; 24RT 2978, 3030-3031; 28RT 3717; 30RT 3973; 37RT 5217; 38RT 5296-5297, 5348; 40RT 5609; 42RT 6115, 6126; 44RT 6498; 46RT 6955; 49RT 7522.) It was Mr. Waco's failure to obey the court's order against making speaking objections that led to the court imposing multiple sanctions against him and holding contempt proceedings. (See *People v. McWhorter,*

supra, 47 Cal.4th at p. 373; *United States v. Donato, supra*, 99 F.3d at p. 434.)

It does indeed appear that Judge Wiatt was correct in accusing Mr. Waco of "acting the fool in front of the jury" (23RT 2916 [*outside* the presence of the jury]; see also 61RT 9469 [judge states to Mr. Waco, "stop acting like a clown," *outside* the presence of the jury]) in order to "inject some prejudice into this trial" (23RT 2918). How else to explain why a veteran deputy public defender would require basic lessons from a trial judge on how to ask a question in a manner to draw fewer objections? (See, e.g., 22RT 2674; 24RT 2948; 43RT 6235, 6285, 6289, 6299-6300.) How else to explain why Mr. Waco would laugh at the jurors, prompting one juror to write a note of complaint to Judge Wiatt? (42RT 6183-6184, 6187, 6214; see also 48RT 7316 [Judge Wiatt admonishes Mr. Waco in front of the jury to stop shaking his head and laughing].) How else to explain why Mr. Waco would state he was ordered by his supervisor to get a physical and mental checkup because the supervisor was concerned Mr. Waco could not do the job? (42RT 6056.) How else to explain why Mr. Waco would ask Fernando Nieves his opinion on why appellant killed the children? (24RT 3008.) This last example prompted Judge Wiatt to state, *outside* the presence of the jury, "I'm not going to let you sabotage your client and be incompetent, and then have this case reversed on appeal many years later." (24RT 3009.) Judge Wiatt was driven by Mr. Waco's relentless bad behavior to threaten to report Mr. Waco to the state bar and to write a letter to the head of the public defender's office regarding Mr. Waco's "intolerable" and "indefensible" conduct in referring in the presence of the jury to a nonexistent "deal" to sentence appellant to life in prison. (43RT 6377.) While appellant does not -- yet- accuse Mr. Waco of incompetence, it does not take a weatherman to see in which direction the postconviction winds will ultimately be blowing. For purposes of this

direct appeal, Judge Wiatt stands in for the ultimate villain in appellant's drama, Mr. Waco.

Far from being biased against appellant and Mr. Waco, Judge Wiatt had a *duty* to correct the numerous instances when Mr. Waco asked misleading questions. (See, e.g., 21RT 2528; 26RT 3111; 28RT 3753; 45RT 6792; 49RT 7487.) Judge Wiatt had a *duty* to enforce the court's lawful orders and to prevent Mr. Waco from ignoring those orders. (See, e.g., 26RT 3378 [disobeyed section 402 ruling in questioning of witness Grose]; 28RT 3703-3705 [disobeyed discovery statute]; 28RT 3731-3732 [Judge Wiatt finds Mr. Waco has withheld discovery regarding Henry Thompson]; 28RT 3757-3759 [Judge Wiatt finds Mr. Waco has withheld discovery on the Lucias]; 30RT 4114 [Judge Wiatt told the jury that Mr. Waco failed to timely disclose statements from several defense witnesses]; 41RT 5862 [Judge Wiatt states during 402 hearing that Mr. Waco appeared to have failed to comply with discovery law].)

Mr. Waco proved, time and time again, that he was willing to engage in extreme behavior to advance appellant's interests. (See, e.g., 9CT 2629 [letter from Dr. Debra Wheatley to Judge Wiatt, complaining about unethical behavior of Mr. Waco]; 9CT 2668 [letter from Dr. Barry W. Hirsch, regarding material that Mr. Waco was withholding]; 23RT 2860-2862 [Judge Wiatt finds Mr. Waco lying regarding prior bad acts by Fernando Nieves]; 35RT 4765-4767 [Dr. Barrows states that Mr. Waco had been pressuring her to make untrue statements about appellant's mental state during her abortion].) Judge Wiatt took seriously his *duty* to control the proceedings in the face of Mr. Waco's outrageous conduct. On the cold record alone, Judge Wiatt was justified in his finding, made outside the presence of the jury, that he did not "trust Mr. Waco to be able to abide by the rules." (24RT 3021-3022.)

Appellant's complaints about Judge Wiatt ignore the judge's considerable restraint exercised during this case. Thus, even though Judge Wiatt expressed his belief, *outside* of the presence of the jury, that Drs. Ney and Humphrey were both liars, and if he were ever to comment on the evidence, this was the case where he *would* do so, he did *not* so comment on the evidence. (46RT 7005.) Judge Wiatt tried numerous times to help Mr. Waco formulate acceptable questions, but eventually Judge Wiatt told Mr. Waco, outside of the presence of the jury, that he would not give Mr. Waco any further guidance on how to formulate questions. (49RT 7539-7540.)

Judge Wiatt continued to control the proceedings during the penalty phase. When Mr. Waco made inappropriate and improper arguments during opening statements, the judge sustained the prosecution's objections. When Mr. Waco seemed unable to make a proper opening statement, the judge admonished him, before the jury, to sit down if he could not state what he expected the evidence to show. (60RT 9270-9271.) When Mr. Waco improperly expressed his personal belief that Dave Folden was frustrated because he was paying the bills, Judge Wiatt again sustained the prosecutor's objection that Mr. Waco was engaging in improper argument. Judge Wiatt warned Mr. Waco that he would terminate his opening statement if Mr. Waco did not make a proper opening statement. (60RT 9281-9282.)

Mr. Waco, however, relentlessly attempted to inject error into the penalty phase of the case, just as he had tried during the guilt phase. If the jury viewed Mr. Waco with disfavor, as appellant argues (AOB 74), it was part of Mr. Waco's game of ignoring the rules of evidence and engaging in legal brinkmanship in order to gain a new trial for appellant on appeal. Thus, when during the cross-examination of Fernando Nieves, Mr. Waco commented on the evidence, in blatant disregard of the court's previous

orders, Judge Wiatt cited Mr. Waco, in the presence of the jury, for misconduct, and admonished the jury to disregard Mr. Waco's comments. (63RT 9930.)

While Judge Wiatt did often admonish Mr. Waco in front of the jury, these admonishments and expressions of irritation did not establish any impropriety or bias against the defense. (*People v. Carpenter, supra*, 15 Cal.4th at p. 353.) Mr. Waco's blatant disregard of the court's admonishments necessitated comment by Judge Wiatt in front of the jury. (*People v. Chong, supra*, 76 Cal.App.4th at p. 244.) Mr. Waco's dissatisfaction with Judge Wiatt's rulings neither justified nor excused his disrespectful behavior towards the court. (*Id.* at pp. 243-244.) "An attorney must not willfully disobey a court's order and must maintain a respectful attitude toward the court." (*Id.* at p. 243.) Mr. Waco was required to respect the court, and the record clearly establishes trial counsel's lack of such respect.

Appellant argues that Judge Wiatt refused to admonish the prosecutors for conduct similar to that of Mr. Waco. (AOB 75, 82, fn. 33, 84, fn. 84.) Appellant is engaging in the same sort of "tit-for-tat" argument as Mr. Waco, and like Mr. Waco, the argument fails because Judge Wiatt's rulings were overwhelmingly correct. (See *United States v. Pisani, supra*, 773 F.2d at p. 402.) Even though the "sterile record" cannot completely convey "the flavor" of what Mr. Waco was trying to do, which was to "inject error into this case" (53RT 8059, 8061), respondent submits the record is adequate to reject appellant's claim of judicial bias.

2. Disparagement and Threats to Defense Witnesses

Appellant next argues that Judge Wiatt displayed bias by disparaging and threatening defense experts (Drs. Humphrey, Ney, and Plotkin) and lay witnesses (Carl Hall and appellant). (AOB 88-110.) While a trial court commits misconduct by persisting in making discourteous and disparaging

comments to defense witnesses that convey to the jury that the court does not believe the testimony of the witness, a trial court does not commit misconduct when commenting at sidebar or during a recess. (*People v. Sturm, supra*, 37 Cal.4th at pp. 1238-1239.) Additionally, a trial court does not commit misconduct when it sua sponte objects to a line of questioning as cumulative or irrelevant. But if the trial court's comments convey to the jury disdain for the witnesses and their testimony, then it has committed misconduct. (*Id.* at p. 1239.) While Judge Wiatt did at times express frustration with some defense witnesses, particularly Carl Hall and appellant, his frustration must be viewed in the context of these witnesses' apparent inability or unwillingness to follow the court's rulings and orders.

Here, the overwhelming majority of the comments that appellant complains about were made outside of the presence of the jury. The comments pertaining to Dr. Humphrey occurred after the jury had been excused or during an Evidence Code section 402 hearing outside the presence of the jury. (38RT 5319, 5489-5490 [jury excused]; 39RT 5503-5504, 5507-5511, 5523, 5530 [section 402 hearing].) The issue confronted here was whether Dr. Humphrey intentionally used the wrong norms to skew appellant's test results in her favor, or whether Dr. Humphrey simply updated her results based on new information. During this section 402 hearing, the prosecution questioned Dr. Humphrey about a six-page document that Dr. Humphrey had turned over to the prosecution the day before, although she had possession of the document for two years.

The document (Peo. Exh. 73) was from a Dr. Satz. Dr. Humphrey had used the document as the basis for scoring the color trails test she had administered to appellant, and she had testified to the jury that her scoring was based on the latest norms, as found in Exhibit 73. There had subsequently been a telephone conversation between Dr. Humphrey and Dr. Satz the previous evening, and based on those conversations, it became

apparent that Dr. Humphrey had used the wrong norms in scoring the color trails test and that her testimony from the previous day was incorrect. (39RT 5507-5511.)

During the course of the hearing, Judge Wiatt cautioned Dr. Humphrey that if she were unsure of her testimony, she should say so, but if she specifically denied something "and it's not true, you have a problem." (39RT 5523.) After Dr. Humphrey had concluded her testimony, Dr. Brook was called to testify at the section 402 hearing. Judge Wiatt excluded Dr. Humphrey from the courtroom, over defense objection, because "if somebody lies in a courtroom, it would be more appropriate that they not be in the courtroom when there's impeachment evidence on that." (39RT 5559.) Following the section 402 hearing, Judge Waco made a credibility determination, outside of the presence of the jury, that Dr. Humphrey was "an out-and-out liar." (39RT 5572.) He further advised Mr. Waco that, while he would not preclude Dr. Humphrey from resuming her testimony in front of the jury, she could be liable for prosecution for perjury. Mr. Waco responded that he did not believe Dr. Humphrey had committed perjury, but he did not otherwise object. (39RT 5573.) Judge Wiatt then stated, "Maybe someone wants to advise her of her right to have an attorney present. I am not going to do that, because I don't want to interfere with the defense and dissuade a witness, and that's one of the reasons I asked her to step outside." (39RT 5574.)

First, the issue of whether Judge Wiatt threatened Dr. Humphrey and thereby dissuaded her from testifying is forfeited because it was not raised in the trial court. (See *People v. McWhorter, supra*, 47 Cal.4th at p. 373.) Additionally, the fact that Dr. Humphrey was not in the court room while this discussion occurred distinguishes this case from *Webb v. Texas* (1972) 409 U.S. 95 [93 S.Ct. 351, 34 L.Ed.2d 330], where the trial court threatened a defense witness on the stand with prosecution for perjury. (*Id.* at pp. 95-

96; see AOB 95.) Finally, Judge Wiatt's opinion that Dr. Humphrey had committed perjury was based on his observance of this witness's testimony.

Dr. Humphrey testified at the section 402 hearing that her testimony of the previous day in front of the jury was not "true," based on her having received "more information." (39RT 5511.) Judge Wiatt, who heard Dr. Humphrey's testimony both days, was in a unique position to judge whether she was lying when she said that her testimony had changed because she had received "more information." His opinion that Dr. Humphrey lied does not show partiality or bias. Instead, it demonstrated that Judge Wiatt perceived that Dr. Humphrey's true purpose was to cover up her intentional use of norms that skewed test results in appellant's favor. "'Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions.'" (*Liteky v. United States* (1994) 510 U.S. 540, 550-551 [114 S.Ct. 1147, 127 L.Ed.2d 474].) Indeed, Judge Wiatt's opinion that Dr. Humphrey was an "out-and-out liar" was later validated by Dr. Brook's testimony that Dr. Satz stated he *did not* give Dr. Humphrey any new norms to use and *did not* tell her to use them in place of the norms in the manual. (40RT 5711.) Calling someone a liar is not misconduct if it is a truthful statement.

Appellant next contends that Judge Waco committed misconduct by threatening Dr. Phillip Ney with an arrest warrant if he was not back in court as previously ordered. (AOB 95.) The facts do not support this contention. On June 27, 2000, Judge Wiatt announced to the jurors that court would be closed in light of the Fourth of July holiday, and that the proceedings would resume on Wednesday, July 5, 2000 at 10:00 a.m. Judge Wiatt specifically stated that the jurors were to be back at 10:00 a.m., "to make sure we don't have any interruptions." (42RT 6206.)

After the jury had been dismissed for the long holiday weekend, Mr. Waco stated that he wanted to discuss with Dr. Ney, who had a practice in Victoria, Canada, whether another day next week would be more convenient with him. Judge Wiatt responded, "What is your suggestion with what to do with the jury on Wednesday, when I ordered them back at 10 a.m., if it's not with this witness? You have no other witnesses, according to you." When Judge Wiatt told Mr. Waco that it had been his (Mr. Waco's) suggestion the previous day that the doctor was available on July 5th, Mr. Waco stated that, if he had said that, he did so without speaking to the doctor. (42RT 6143, 6207.)

Judge Wiatt then ordered Dr. Ney to be back in court on July 5th at 10:00 a.m. When Mr. Waco persisted that he wanted to talk to Dr. Ney, the judge responded, "This court proceeding is going to take precedence over his personal life." (42RT 6208.) Following further discussion, wherein Mr. Waco implicitly accused the court of unfairness because it had allowed a prosecution expert to reschedule his court appearance around a prepaid vacation, he then stated, "If [Dr. Ney] comes back on Wednesday" and was interrupted by Judge Wiatt, "If? I ordered him back." (42RT 6209.) Dr. Ney then asked if he could return at 11:30 a.m. on July 5th, so he could fly in and out on the same day. Judge Wiatt, however, expressed concern about the possibility that Dr. Ney could miss his flight in the morning, thus inconveniencing the jurors. Judge Wiatt wanted Dr. Ney to fly in on the night of July 4th, in order to appear on July 5th. (42RT 6211-6212.)

Both Mr. Waco and Dr. Ney persisted in arguing the point, and Dr. Ney stated that he was seeking legal advice. Judge Wiatt announced the court was in recess, and Mr. Barshop stated he was concerned that Dr. Ney was not going to return, given his comments about legal counsel. (42RT 6212.) Judge Wiatt responded, "If he doesn't come back, then we'll deal with that." Mr. Barshop asked whether the procedures under Penal Code

section 1332, for securing the testimony of a material witness, was appropriate. Judge Wiatt then responded, "We're not going to do that. If he doesn't come back and he's ordered back, I'll issue a warrant for his arrest. And I'm sure the Canadian authorities will cooperate. [¶] If they don't, I'll tell the jury why he's not back and they'll be instructed appropriately." (42RT 6213.)

Given this history, which shows that both Mr. Waco and Dr. Ney were at least considering disobeying the court's order, respondent submits that Judge Wiatt's comments were appropriate under the circumstances and in light of his duty to control the proceedings in an expeditious and effective manner. (§ 1044; *People v. Guerra* (2006) 37 Cal.4th 1067, 1111-1112.) Further, given that these proceedings all occurred outside of the presence of the jury, there was no misconduct. (*People v. Sturm*, *supra*, 37 Cal.4th at pp. 1238-1239.)

Appellant also argues that Judge Wiatt committed misconduct when, in the presence of the jury during cross-examination of Dr. Ney, he told Ms. Silverman to "just ask a direct question, and if it's inconsistent then you can impeach him with the transcript." (AOB 95-96, citing 42RT 6096.) Appellant argues that this comment implied that Dr. Ney was lying. However, there was no objection to the comment on the grounds of judicial misconduct or bias, so this claim is forfeited. (*People v. Sanders* (1995) 11 Cal.4th 475, 531.) It is unlikely the jury would have taken this brief comment to mean that the judge thought Dr. Ney was lying, as opposed to offering more efficient impeachment techniques. However, if counsel had objected and asked for an admonition it would have allowed the judge to dispel any possibility that the jury could have misconstrued his comment. In any case, the comment did not amount to misconduct, as it was brief, accurate, and fair.

Next, appellant claims Judge Wiatt displayed judicial hostility towards Dr. Gordon Plotkin. (AOB 96-99.) This claim must be viewed in context and in light of the entire record. (*People v. Wright, supra*, 52 Cal.3d at p. 411.) By the time of Dr. Plotkin's testimony, Mr. Waco had been engaging in a persistent pattern of ignoring the court's orders. That is, Mr. Waco persisted in trying to question Dr. Plotkin based on facts outside the evidence, in violation of the court's order. (See 52RT 7822, 7824, 7827.)

After a series of prosecution objections were sustained regarding carbon monoxide poisoning and whether appellant could remember writing letters, there was a side bar. Mr. Waco was asked for an offer of proof and he responded that the questioning sought to elaborate on the differences in the CPK level "in comparing the mild case of carbon monoxide poisoning as opposed to a more significant carbon monoxide poisoning." The prosecutor, Ms. Silverman, stated that her objections were based on Dr. Plotkin's admission that he was not an expert on carbon monoxide poisoning and how it related to the enzyme CPK. Judge Wiatt ruled that Mr. Waco had made an insufficient offer of proof and under Evidence Code section 352 the objections were sustained. (52RT 7869-7872.) Mr. Waco, however, persisted in questioning Dr. Plotkin about CPK. (52RT 7873-7878.)

Under Evidence Code section 352, Judge Wiatt then ordered Mr. Waco, in the presence of the jury, to move on and not ask any more questions about the CPK. (52RT 7879.) Mr. Waco was told by Judge Wiatt to make an offer of proof as to any further questions to Dr. Plotkin, because the court was sustaining all of the People's objections. Judge Wiatt gave Mr. Waco 10 minutes to finish questioning Dr. Plotkin. (52RT 7890-7893.) In the presence of the jury, after Mr. Waco proved himself unwilling to comply with the court's order and ask a proper question, Judge

Wiatt terminated Mr. Waco's direct examination of Dr. Plotkin, based on the court's previous rulings. (52RT 7899.)

Judge Wiatt's termination of Mr. Waco's examination of Dr. Plotkin was not an expression of judicial bias, but rather another mighty effort on the part of the judge to control the proceedings in light of Mr. Waco's stubborn insistence on ignoring the court's rulings. In any event, Judge Wiatt was not just trying to control the proceedings in one direction; he also sustained numerous defense objections to Mr. Barshop's questioning of Dr. Plotkin, and rephrased questions for Mr. Barshop. (52RT 7905-7907, 7911, 7916, 7921, 7923, 7976, 7979, 7981.) The rulings were by no means one-sided.

It is against this background of contentiousness that appellant argues that Judge Wiatt "gratuitously took over the examination" of Dr. Gordon Plotkin "in order to undermine Dr. Plotkin by making him appear shallow and incompetent." (AOB 96-99, citing 52RT 8008-8009.) First, defense counsel did not object when the judge questioned Dr. Plotkin, so this claim is forfeited. (*People v. Sanders, supra*, 11 Cal.4th at p. 531.) In any event, the questioning, which concerned whether Dr. Plotkin knew that he could go online and order documents by e-mail, was brief, accurate and fair. Judge Wiatt had a duty to see that issues were clearly presented to the jury and he was not required to sit like a "'bump on a log' throughout the trial." (*United States v. Pisani, supra,* 773 F.2d at p. 403.) While appellant argues this questioning made Dr. Plotkin appear shallow and incompetent, it is pure speculation that the jurors would have drawn this conclusion. However, if counsel had objected, the trial court could have dispelled any misunderstanding with appropriate admonitions. (*People v. Snow, supra,* 30 Cal.4th at p. 78.)

Appellant additionally argues that Judge Wiatt "gratuitously disparaged" Dr. Plotkin when, after Dr. Plotkin testified that it would have

been preferable to have interviewed appellant before his testimony, Judge Wiatt commented "then why did you accept the appointment?" (AOB 97, citing 53RT 8104.) Since there was again no objection to this comment, the claim is forfeited. (*People v. Snow, supra,* 30 Cal.4th at p. 78; *People v. Sanders, supra,* 11 Cal.4th at p. 531.) Further, the comment was brief and allowed Dr. Plotkin to explain that he took the appointment because he generally enjoyed the work, but had he known that the prosecutors would attempt to personally impugn his integrity, he would not have accepted the appointment. (53RT 8105-8106.) Notably, these comments were *not* stricken by Judge Wiatt, as they might otherwise have been by a judge who was as biased as appellant claims here.

Likewise, appellant argues that Judge Wiatt denigrated Dr. Plotkin in front of the jury when he told the doctor that he should confine his answers and not assume what was in Dr. Ney's mind. (AOB 99, citing 53RT 8186-8187.) Defense counsel did not object to the comment, so the claim is forfeited, and in any event, the comment was brief and fair. (*People v. Snow, supra,* 30 Cal.4th at p. 78; *People v. Sanders, supra,* 11 Cal.4th at p. 531.)

Judge Wiatt did admonish Dr. Plotkin, *outside* the presence of the jury, not to argue with the court in front of the jury. Dr. Plotkin's behavior, in this context, appeared to be mirroring Mr. Waco's example. Judge Wiatt further admonished Dr. Plotkin that if he had "some problem" with the court or with being on the expert witness panel, then "I will contact the head of the panel and I will have you taken off." (53RT 8119.) However, since these comments occurred outside the presence of the jury, they were not misconduct. (*People v. Sturm, supra*, 37 Cal.4th at p. 1239.) Nor did the comments demonstrate judicial bias. Rather, they were examples of Judge Wiatt exercising reasonable control over the proceedings in an effort

to avoid inadmissible or unduly prolonged testimony. (*People v. Harris* (2005) 37 Cal.4th 310, 347.)

As for defense witness Carl Hall, Judge Waco's comments towards this witness did not draw any objections and were made in an effort to control a witness who would not or could not obey the court's orders. Mr. Hall repeatedly ignored the court's admonishments, in effect forcing the judge to tell Mr. Hall that if he did not answer the questions as they were asked, without volunteering information, then he would face contempt proceedings, including a fine and jail. (See 62RT 9653-9658.) Appellant characterizes Mr. Hall as an unsophisticated witness (AOB 99), but the record shows that Mr. Hall was a recalcitrant witness who was determined to do things his way in the courtroom -- much like Mr. Waco. The trial court's conduct in trying to control Mr. Hall's behavior was not misconduct. (See *People v. Snow, supra*, 30 Cal.4th at p. 78.)

Judge Waco also did not commit misconduct when he ordered appellant to look at the photographs of her dead children. Appellant testified on cross-examination that she did not remember stepping over her children to get outside, prompting the prosecutor to ask appellant to turn around and look at the photograph depicting her children dead on the floor. Appellant refused, and then refused the court's order to look at the photograph. (35RT 4932.) Judge Waco had a duty to control the proceedings (§ 1044) and appellant's refusal to look at the photograph was but another example of a recalcitrant witness who, apparently taking her cues from Mr. Waco, chose to ignore the court's lawful order. (See 35RT 4932-4934.) As Judge Wiatt stated in response to Mr. Waco's objection, appellant was "a witness like any other witness in a case. It was a relevant area of inquiry, and you haven't framed any objection other than it was inappropriate, which is not a legally recognized objection ...." (35RT 4937.)

3. *The Court's Duty to Control the Proceedings Did Not Deny Appellant Due Process*

Appellant next contends that Judge Wiatt so skewed the proceedings against appellant that she could not obtain a fair trial in either the guilt or penalty phase. In a multi-pronged attack on Judge Wiatt, appellant first argues that he was "hyper technical" in curtailing the scope of defense questioning. Appellant reels off page after page of examples, plucked from the voluminous record, where the trial court sustained objections to Mr. Waco's questions on the grounds that the questions were argumentative, while allowing the prosecution more leeway in their questioning. (AOB 111-116.) Appellant also argues that Judge Wiatt "continually truncated defense questioning." (AOB 116-118.) Appellant further argues that Judge Wiatt assisted the prosecution by improperly engaging in its own internet research (AOB 118-124), by refusing to accommodate the scheduling of defense witnesses (AOB 124-128), by aggressively enforcing discovery obligations against appellant, but relaxing those obligations for the prosecution (AOB 129-130), and by providing the prosecution with funding for its experts, while the defense was limited to section 987.9 restrictions (AOB 131-136).

The overwhelming majority of the instances cited by appellant are forfeited by the failure of Mr. Waco to object on grounds of judicial misconduct and seek an admonition. The failure to raise an objection below on the grounds asserted on appeal, and to seek a jury admonition regarding any of the alleged instances of judicial intemperance, results in a forfeiture of the issue for appellate review. (*People v. McWhorter, supra,* 47 Cal.4th at p. 373.)

Moreover, Judge Wiatt had a duty to control the proceedings during trial and to limit the introduction of evidence and the argument of counsel to relevant material matters for the expeditious, effective ascertainment of

the truth. (§ 1044.) To this end, Judge Wiatt acted within the scope of his duty when refusing to allow improper questions to be answered, even when no objection was interposed. (*People v. Clark, supra*, 3 Cal.4th at p. 144.) Given the sheer volume of objections interposed in this prolonged trial, "a simple numerical tally of those sustained and overruled, one which here favors the government, is not enough to establish that the scales of justice were tipped against" appellant. (*United States v. Pisani, supra*, 773 F.2d at p. 402.)

Judge Wiatt took control of the proceedings and used a firm hand to try to keep the proceedings from becoming derailed by a defense counsel who was determined to inject error into the proceedings. A simple numerical count of the number of objection sustained, which here favored the prosecution, should not be allowed to tip the scales of justice to overturn the present judgment. It must be underscored that Mr. Waco, at the time of the instant trial, had been a deputy public defender for 35 years and was the most senior deputy public defender in the county. (22RT 2707.) However, Mr. Waco's antics from the very beginning of this case caused one judge to tell Mr. Waco that his arguments were "just ridiculous" (2RCT 206) and drove Judge Wiatt to proclaim that Mr. Waco was "acting the fool in front of the jury" (23RT 2916) in order to deliberately "inject some prejudice into this trial" (23RT 2918; 24RT 3010). Mr. Waco appeared to purposely choose to ask inappropriate questions (see, e.g., 52RT 7931) that drew objections from the prosecution and admonitions from Judge Waco. The purposeful nature of Mr. Waco's actions are highlighted when compared to his examination of a witness whom he claimed to be unprepared to examine: Mr. Waco's questioning improved under circumstances where it would seem his performance should have suffered. (See, e.g., 53RT 8059.) His seeming inability to ask a proper question in most other circumstances prompted Judge Wiatt to step in with

advice on how to frame his questions to draw fewer objections (see, e.g., 24RT 2948; 43RT 6285, 6299-6300), but to no avail. Judge Wiatt's determination to not allow Mr. Waco to "sabotage" the defense (24RT 3009) did result in Judge Wiatt taking an active role in this case, but his involvement did not tip the scales of justice against appellant.

Appellant argues that Judge Wiatt assisted the prosecution by improperly engaging in Internet research involving Dr. Ney and Dr. Plotkin. (AOB 118-124, citing 41RT 5846-5848, 5873 [Dr. Ney]; 52RT 8007-8008 [Dr. Plotkin].) Mr. Waco failed to interpose timely, specific objections in the trial court on the same basis as raised on appeal, thus this claim is forfeited. (*People v. McWhorter, supra,* 47 Cal.4th at p. 373.) In any event, Judge Wiatt had a duty to see that the issues were clearly presented to the jury. His Internet research assisted him in fulfilling this duty. (See *People v. Carlucci* (1979) 23 Cal.3d 249, 255 [trial judge has a duty to see that the evidence is fully developed].) Additionally, as Judge Wiatt's questioning of Dr. Ney was *outside* of the presence of the jury, appellant cannot show prejudice. (*People v. Sturm, supra,* 37 Cal.4th at p. 1243.) And Judge Wiatt's questioning of Dr. Plotkin, regarding whether he knew that he could order documents over the Internet on Saturdays, was brief and helped clarify the basis for Dr. Plotkin's opinion. (Evid. Code, § 775; *People v. Cook* (2006) 39 Cal.4th 566, 597; *People v. Carlucci, supra,* 23 Cal.3d at p. 255.) There was no misconduct here.

Appellant next argues that Judge Wiatt refused to accommodate the scheduling of defense witnesses, but freely accommodated and allowed prosecution experts to testify during the defense case. (AOB 124-128.) A trial court has inherent as well as statutory discretion to control the proceedings to ensure the efficacious administration of justice. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 951; *People v. Cox* (1991) 53 Cal.3d 618, 700; see § 1044; Evid. Code, § 765.) The trial court has discretion in

regulating the order of witnesses. (*People v. Roybal* (1998) 19 Cal.4th 481, 511; see §§ 1093, 1094; Evid. Code, § 320.) Where the defendant fails to object to witnesses being called out of order, he cannot show prejudice. (*People v. Norman* (1967) 252 Cal.App.2d 381, 409, overruled on other grounds by *McDermott v. Superior Court* (1972) 6 Cal.3d 693, 697.)

Here, a review of the record shows that Judge Wiatt exercised his discretion in a reasonable manner in the area of witness scheduling. Thus, Judge Wiatt allowed Mr. Waco to call Clare Cserney to testify out of order for the defense, for the convenience of the witness. (20RT 2340-2341.) However, earlier that day, Judge Wiatt would not allow Mr. Waco to call his arson expert, Del Winter, out of order that week because the People had scheduled appellant's son, David, who was 15 at the time of trial, to testify and had to make arrangements for him to be absent from school for the rest of the week. (20RT 2200.) Appellant suggests that Judge Wiatt was being unreasonable and biased (AOB 124-125, 128), but Judge Wiatt had to balance the inconvenience to a paid defense expert against the inconvenience to a high school student and victim who was required to miss school in order to face a grueling experience in court against his own mother. Moreover, Alethea Volk, whose cross-examination would be interrupted, indicated that she was available to come in on another day. (See 20RT 2381-2383.) Under these circumstances, the judge did not show bias in allowing the prosecution to call David out of order.

Appellant further argues that Judge Wiatt was being unreasonable for failing to accommodate a defense request to reschedule defense expert neurologist Dr. Michael Gold. Judge Wiatt would not do so, observing that "somebody's vacation is not good cause to continue or reschedule." (31RT 4232.) Considering that the trial had already been continued for two weeks due to Mr. Waco's intentional withholding of discovery (see 31RT 4232-

4233), appellant cannot show that the trial court abused its discretion in refusing to continue or reschedule the appearance of a paid expert witness.

Similarly, Judge Wiatt did not abuse his discretion when he ordered Dr. Ney to return to court on Thursday, June 29, 2000. Judge Wiatt told Mr. Waco, "Look I have a jury coming back Thursday. I will give you a choice. You have your other witness here Thursday, or Dr. Ney is going to be here Thursday." (41RT 5929.) First, Judge Wiatt had the jurors coming back on Thursday, so he wanted to be sure that there would be testimony for them to hear; in this protracted and lengthy trial, it was important to try to minimize the number and length of the delays. Moreover, Judge Wiatt gave Mr. Waco a choice to bring in another witness. There was no abuse of discretion under these circumstances. (See *People v. Gonzalez, supra,* 38 Cal.4th at p. 951; *People v. Roybal, supra,* 19 Cal.4th at p. 511; *People v. Cox, supra,* 53 Cal.3d at p. 700; see also §§ 1044, 1093, 1094; Evid. Code, §§ 765, 320.)

Likewise, the judge did not show bias when it allowed Dr. Robert Chang, a percipient witness, to testify out of order because "he's not being compensated." The prosecution indicated that Dr. Chang's testimony would only last about 15 minutes. (43RT 6310.) Given the brief length of his testimony, and the fact that he was not a paid expert, as was Dr. Ney, the trial court did not abuse its discretion in interrupting Dr. Ney's testimony to allow Dr. Chang to testify. Finally, the trial court allowed the prosecution to call Dr. Brook out of order. Dr. Brook had a prepaid trip out of the country, and the reasons he had to be taken out of order was because Mr. Waco's discovery violation had caused a two-week continuance. (37RT 5108-5110.) The trial court did not abuse its discretion in allow Dr. Brook to testify out of order.

Appellant next argues that the trial court aggressively enforced discovery obligations against appellant, but relaxed and ignored disclosure

obligations of prosecution witnesses. Appellant challenges the trial court's substantive rulings in her arguments found in sections XIII and XXIV of her opening brief, which she incorporates by reference. However, appellant asserts the trial court acted unfairly by not enforcing the same discovery obligations against the prosecution. (AOB 129-130.) Appellant cites as an example the trial court's denial of a defense motion for mistrial or, in the alternative, to strike the testimony of Dr. Ribe, from the coroner's office, because "materials were not disclosed in advance of his testimony in discovery." (AOB 129.) But it was not that "materials" were not disclosed; rather, Mr. Waco received Dr. Ribe's reports, but "there were a few lines dropped apparently from his report regarding the dictation." The issue was fully explained in front of the jury and Dr. Ribe was fully available for cross-examination of the issue. (19RT 1994.) A few lines inadvertently dropped from a report did not justify either a motion for mistrial or striking Dr. Ribe's testimony, which were the only sanctions appellant sought.

Appellant also argues that the trial court treated her unfairly when, in response to Mr. Waco's objection that the prosecution failed to turn over gas chromatograph readout results that witness Phil Teramoto used as a basis for his testimony, Judge Wiatt responded, "So what?" (AOB 130, citing 28RT 3656-3658.) The response was indeed terse, but Judge Wiatt was merely inviting Mr. Waco to explain how appellant was prejudiced by the alleged failure. Judge Wiatt, however, also told Mr. Waco that if his expert testified that he needed the readout results, "then we'll delay his testimony and give him some time to prepare, or you can fax it to him." (28RT 3658.) There is no indication in the record that appellant's arson expert, Del Winter, needed or requested more time to examine the gas chromatograph readout results. Given that Judge Wiatt offered to allow the

expert more time to prepare, appellant's argument that the judge exhibited bias is not supported by the record.

Appellant further contends that Judge Wiatt was unfair and one-sided because he ordered defense experts to prepare typewritten versions of their notes for the prosecution, but denied a defense request for transcription of a prosecution expert's notes. (AOB 130-131.) This claim is forfeited because counsel did not object on the grounds of judicial misconduct or bias. (*People v. McWhorter, supra*, 47 Cal.4th at p. 373.) In any event, the prosecutor contended that the notes of Drs. Kaser-Boyd, Plotkin, Ney and Humphrey were difficult to read and, in the case of Dr. Ney, virtually undecipherable. (29RT 3911-3912; 30RT 3939-3940; 48RT 7366-7367.) Mr. Waco offered to have his experts assist with any words or phrases the prosecutors could not read. (29RT 3915-3916.) Mr. Waco stated that he had "no problem" with the concept that the prosecution was entitled to read and decipher the notes from his experts. (30RT 3940-3941.) Accordingly, appellant's position on appeal is not well-taken. Nevertheless, appellant complains that when Mr. Waco later requested transcriptions of a prosecution expert's notes (Dr. Brook), Judge Wiatt refused the request. (AOB 131.) In fact, Judge Wiatt denied Mr. Waco's request without prejudice to a later request for transcription, *if* Mr. Waco could establish a *sufficient factual basis* for the request. (35RT 4850; 36RT 4948.) Judge Wiatt further observed that there was no need to transcribe Dr. Brook's notes, because defense expert Dr. Humphrey was going to meet with Dr. Brook and go over the notes with him. (36RT 4953.) Thus, appellant has not established that Judge Wiatt was biased in his rulings.

Appellant additionally argues that Judge Wiatt unfairly appointed most prosecution experts without any hearings at all, while appellant's experts were required to undergo hearings before being appointed. (AOB 131-137.) This claim is unfounded for a number of reasons. First,

appellant never objected below on the same grounds raised here, and therefore the claim is forfeited. (*People v. McWhorter, supra*, 47 Cal.4th at p. 373.) Next, as appellant acknowledges, her defense experts were funded in accordance with section 987.9, which sets forth the procedures for indigent capital defendants to obtain funds for preparation of the defense.

As appellant further acknowledges, her requests for expert witness funds were heard by judges in the downtown courtroom, *not* by Judge Wiatt. (AOB 131-132.) And, while Mr. Waco objected that the prosecution had not shown that it was "indigent" in getting its experts appointed, as the defense was required to do, Judge Wiatt did not overstep the bounds of reason in calling this argument "ridiculous" and "the stupidest thing I've ever heard in a courtroom." (39RT 5578-5579; see Evid. Code, §§ 730-731 [governing appointment and payment of court-appointed experts]; *McGuire v. Superior Court* (1969) 274 Cal.App.2d 583, 598 [order granting request for appointment is within discretion of court and the court shall appoint those experts it deems necessary for the case].) Accordingly, any claim that Judge Wiatt was biased in his funding of appellant's defense experts is completely without merit.

Finally, appellant argues that Judge Wiatt improperly communicated ex parte with the prosecutors and prosecution experts on two occasions, June 20, 2000 and June 23, 2000. (AOB 137-145.)[14] Mr. Waco was absent on June 20th, due to illness.[15] (36RT 4958). Transcripts from both ex parte hearings were ordered sealed and one copy each was provided to the prosecution. (See 36RT 5024; 39RT 5500; see also 18RCT 4646 [minute

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[14] The trial court also had ex parte hearings with defense counsel. (See, e.g., 8RT 300-303 [ex parte hearing regarding defense request for prepaid transportation of witnesses].)

[15] Respondent has searched the record, and it does not appear that Mr. Waco was ever informed by Judge Wiatt that these hearings occurred.

order from 6/20/00.) The subject of the hearing on June 20th regarded the prosecution's obligation to disclose to Mr. Waco evidence that Dr. Kaser-Boyd had committed perjury in a previous case. (36RT 5018-5020.) Ms. Silverman stated that she had "concerns about disclosing the information to counsel" because "it may give Dr. Kaser-Boyd the opportunity to try and cover her tracks on this case." (36RT 5021.)

Judge Wiatt questioned prosecution expert, Dr. Hirsch, on his knowledge regarding Dr. Kaser-Boyd's testimony in the previous case. (36RT 5021-5022.) Judge Wiatt then asked the prosecution to provide him with a transcript of Dr. Kaser-Boyd's prior testimony in *People v. McClure*, and an e-mail she subsequently sent to another expert. (36RT 5022; see also sealed Supp. III CT 106-198 [report dated 5/2/97 from Dr. Kaser-Boyd; e-mail dated 4/29/97 between Dr. Kaser-Boyd and Dr. Butcher; transcript from *People v. McClure*, dated 4/21/97 and 3/20/97].)

Judge Wiatt also suggested that the prosecution read *People v. Tillis* (1998) 18 Cal.4th 284, and cited that case as authority for the proposition that the prosecution is required to disclose the identity of witnesses and their statements, even for rebuttal, but there is no requirement to disclose information for purposes of cross-examination. (36RT 5022-5023.) The prosecution then asked Judge Wiatt if he would allow the People to take certain witnesses out of order "in the middle of the defense case." (36RT 5023.) Judge Wiatt stated he would consider it if the People showed "fairly good reason to do it," but that the issue should be addressed the following day when Mr. Waco was feeling better and in court. (36RT 5024.) Ms. Silverman then asked Judge Wiatt whether or not the court had sealed her previous request for a gag order in reference to PET scans. (36RT 5024.) Judge Wiatt stated that he did not think the request for a gag order had been sealed, and Ms. Silverman responded that the prosecution would "probably be requesting [a sealed gag order] tomorrow as well then." (36RT 5025.)

At the ex parte hearing on June 23, 2000, the prosecutors and Dr. Hirsch were again present, and Judge Wiatt stated that he had reviewed the transcripts, e-mail, and other reports submitted by the prosecution under seal. Based on his review, Judge Wiatt found the prosecution was not required to provide discovery to the defense "at this time" and suggested that if the information was used in cross-examination "the reports themselves need not be used." (39RT 5497.) The prosecution also discussed the need for additional funding for two of its experts. Citing the complexity of the case, Judge Wiatt stated he would "lift any previously imposed limits on the experts for the prosecution in this case." (39RT 5498.) The prosecution also notified Judge Wiatt that it would be calling as percipient witnesses two doctors who had treated appellant. One of the doctors was "already on the witness list." (39RT 5499.)

Section 1054.7 provides as follows:

> The disclosures required under this chapter shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred. "Good cause" is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement.
>
> Upon the request of any party, the court may permit a showing of good cause for the denial or regulation of disclosures, or any portion of that showing, to be made in camera. A verbatim record shall be made of any such proceeding. If the court enters an order granting relief following a showing in camera, the entire record of the showing shall be sealed and preserved in the records of the court, and shall be made available to an appellate court in the event of an appeal or writ. In its discretion, the trial court may after trial and conviction, unseal any previously sealed matter.

(*Ibid.*)

The record here reveals that the prosecution sought an ex parte, in camera hearing concerning disclosure of the impeachment evidence against Dr. Kaser-Boyd. The prosecution was concerned that if the information were disclosed to defense counsel, Dr. Kaser-Boyd would "try and cover her tracks on this case." (36RT 5021.) Rulings on discovery motions are "addressed to the sound discretion of the trial court ...." (*Hill v. Superior Court* (1974) 10 Cal.3d 812, 816; see also *People v. Panah* (2005) 35 Cal.4th 395, 458.) Section 1054.7 provides that disclosure of discovery may be "denied, restricted, or deferred" for "good cause," which includes "possible loss or destruction of evidence." However, while section 1054.7 provides for an "in camera" hearing, it says nothing about the hearing being "ex parte."

No published decision has discussed whether section 1054.7 permits "ex parte" hearings. (See generally, *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121 (*Alvarado*).) At issue in *Alvarado* was not the validity of an ex parte hearing, although there was an ex parte hearing in that case, over defense objections. (See *Alvarado, supra*, at p. 1128.) Rather, at issue in *Alvarado* was "the validity of an order, entered prior to trial in a criminal action, that authorizes the prosecution to refuse to disclose to the defendants or their counsel, both prior to and at trial, the identities of the crucial witnesses whom the prosecution proposes to call at trial, on the ground that disclosure of the identities of the witnesses is likely to pose a significant danger to their safety." (*Id.* at p. 1125, italics omitted.) The court concluded that it violated neither the right of confrontation nor due process to keep a witness's identity secret *before trial* for "good cause," as set forth in section 1054.7. (*Id.* at pp. 1034-1036.) However, an order withholding such information *during trial* was unconstitutional. (*Id.* at pp. 1151-1152.)

Respondent submits that it is unnecessary to resolve the issue of whether the trial court engaged in improper ex parte contact with the prosecution over disclosure of discovery, because any error was harmless beyond a reasonable doubt. (See *People v. Jennings* (1991) 53 Cal.3d 334, 383-384 [unauthorized ex parte contacts with jury harmless beyond a reasonable doubt], citing *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) Here, Dr. Kaser-Boyd was ultimately not called as a witness, by either side. (See 46RT 6858 [prosecution declines to call Dr. Kaser-Boyd]; 63RT 9895-9896 [defense declines to call the doctor].) Thus, the impeachment material that was not disclosed to the defense was never used.

Moreover, the discussions on June 20th regarding the scheduling of prosecution witnesses and whether a gag order was in place were brief. The scheduling issue was brought up again the following day in the presence of the defense. (See 37RT 5108.) The issue of whether a gag order was in place was not raised by the prosecution the following day, although defense counsel did refer to a gag order on the PET scan evidence. (37RT 5102, 5114.) However, as the prosecution was only asking the court whether it had actually sealed the prosecution's request or not, the request for information was harmless beyond a reasonable doubt. Appellant argues that the error was "structural and requires automatic reversal." (AOB 145, citing *Gray v. Mississippi* (1987) 481 U.S. 648, 668 [107 S.Ct. 2045, 95 L.Ed.2d 622] [erroneous excusal of a prospective juror based upon his or her views regarding capital punishment result in automatic reversal of death sentence].) However, the error here is similar to the error found in *People v. Jennings*, *supra,* 53 Cal.3d at pages 383-384, and respondent respectfully submits the harmless error test equally applies here. (See also *United States v. Hackett* (9th Cir. 1980) 638 F.2d 1179, 1188 [applying harmless

error test to ex parte contacts between judge and prosecution].) Any error here was harmless beyond a reasonable doubt.

4. The Solid and Overwhelming Evidence of Appellant's Guilt for the Murder of Four of Her Children Render Any Error Here Harmless

Here, appellant's conviction and death sentence cannot be attributed to the manner in which the trial court conducted the legal proceedings. The blame rests squarely on appellant and the capital crimes she committed. There was solid and overwhelming evidence presented at the guilt phase showing that appellant intentionally set the fire that took the lives of her four daughters and almost took the life of her only son, and that she did so primarily in order to gain revenge on Scott Volk for breaking up with her and Dave Folden for seeking to annul the adoption of her three oldest children. The most damaging evidence came from her surviving son, David, who testified that appellant organized the slumber party the night before the fire, insisted that David participate in the slumber party even though he did not want to, and that when he awoke in the middle of the night choking on smoke, appellant told him to stay where he was, not to go outside even though he wanted to, and to breathe into his blankets. Appellant would not even allow her daughter to get up and vomit in the bathroom, but ordered her to vomit on the floor. Further, the evidence established that appellant wrote and mailed a letter to Dave Folden just prior to the fire, which told him in the most scathing and obscene manner possible that he no longer had to support her or any of the children.

Additionally, the evidence was overwhelming that the fire was intentionally set, and not done in any sort of "fugue state." Dr. Dehaan, the arson expert, testified that, based on the quantity of gasoline poured and where the gasoline was poured, the fire was intentionally set with the intent to destroy the house. (44RT 6503-6504.) Dr. Brooks, a prosecution expert

in neuropsychology, was not able to personally evaluate appellant, because she refused to be evaluated, but he did examine appellant's medical records, school history, and psychological evaluations. He also listened to appellant's testimony. (38RT 5375-5378.) Dr. Brooks testified that appellant malingered on her 1999 MMPI-2 test. (38RT 5396.) Dr. Brook examined neurological testing done by Dr. Humphrey, and the results indicated that appellant was malingering, rather than suffering from organic brain damage. (40RT 5714-5716.) There were no indications that appellant suffered from any type of brain injury causing cognitive dysfunction. (40RT 5721-5722.) Any error that occurred during the guilt phase was harmless in the face of this overwhelming evidence of appellant's guilt.

The evidence presented at the penalty phase was likewise overwhelming. The evidence showed that appellant was a highly manipulative, overly controlling parent who insisted that the men in her life do things her way. She had no mental defect or deficiency to explain away her actions. While her childhood was by no means perfect, she had good grades and good friends throughout her childhood, notwithstanding her bouts of breath-holding when throwing a tantrum. The prosecution presented victim impact evidence showing that the surviving family members were devastated by the loss of the four girls, and continued to be even at the time of trial. Given the state of the evidence, any bias exhibited by the trial court was harmless, whether analyzed under the *Chapman v. California*, *supra*, 386 U.S. at page 24 "harmless-beyond-a-reasonable-doubt" standard, or the miscarriage of justice standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836.

II. THE TRIAL COURT DID NOT COMMIT ERROR DURING VOIR DIRE

Appellant next contends that the trial court prejudicially failed to conduct or permit adequate voir dire, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the California Constitution. According to appellant, the trial court conducted a "rushed, careless and inadequate voir dire" that was unsuited to a high profile, emotionally charged case such as the present one. Specifically, appellant contends that the jury questionnaire drafted by the trial court failed to ask questions directed at the jurors' ability to follow the law if the evidence showed the multiple murder of children. Appellant further contends that the trial court refused to allow defense counsel to ask follow-up questions. (AOB 147-191.) This claim fails because it is unsupported by the record.

A. Background

On September 8, 1999, appellant filed a request to require prospective jurors to answer her own proposed questionnaire. It included 63 general questions and 36 questions directed at attitudes toward the death penalty. (10RCT 2118-2138.) During a hearing on December 13, 1999, the trial court announced it would be using a juror questionnaire of its own design, but it would consider input from both sides. The trial court stated, "We'll start from what I think is appropriate, and we'll go from there." (6RT 185-186.) On January 5, 2000, defense counsel filed an amendment to his prior request to require prospective jurors to answer the defense's proposed questionnaire. The second proposal again sought to amend the trial court's proposed juror questionnaire, including questions 64 and 65, which asked whether the jurors would vote for the death penalty if there were four victims or the victims were four children, no matter what the mitigating circumstances were. (10RCT 2230-2235.)

At a hearing on January 20, 2000, the trial court ordered the two sides to submit a compromise juror questionnaire, and if the two sides could not reach an agreement, the court would consider "your individual request." (7RT 199-200.)

On February 24, 2000, both sides submitted their own proposals to the court. The prosecution's proposed juror questionnaire consisted of 107 questions, of which 18 were directed at the jurors' attitudes towards the death penalty. (10RCT 2263-2277.) Defense counsel proposed that the trial court adopt his amended juror questionnaire, as opposed to the original juror questionnaire that he had filed. Defense counsel asked the court to "adopt the amendment and add it to the court's" questionnaire. Defense counsel further stated he was "satisfied with the court's" proposed juror questionnaire if supplemented with his "amendments." The trial court again asked the two sides to meet and confer as to whether there were any questions they agreed or disagreed on. (7RT 207-209.)

On March 2, 2000, the trial court estimated that juror selection would take three or four days. (7RT 249.) Defense counsel stated that after looking over the court's questionnaire, "I am willing to take my chances without any questionnaire whatsoever." (7RT 250-251.) The trial court asked, "Without any questionnaire?" and defense counsel replied, "Yes, sir." The trial court stated it "definitely" would use a questionnaire, in order to avoid individually questioning the jurors. (7RT 251.)

On March 10, 2000, there was a hearing wherein juror questionnaires were discussed and the parties were in agreement with some exceptions. The trial court stated it would not necessarily adopt the questions the parties had agreed upon. (8RT 274-275.) The trial court and the parties went over the proposed amendments to the court's questionnaire, question by question, discussing whether they agreed or disagreed on the questions. (8RT 275-278, 281-286.) Regarding the proposed amendment to the death

penalty questions, the trial court stated, "I am going to use my questions, period. Those are the questions that are required. They've been tested and proven in reported decisions, and I feel comfortable sticking with the questions regarding the death penalty that I know are going to withstand any kind of a challenge." (8RT 287.) The trial court stated it would include defense counsel's proposed amendment to include information about the victims, but would do so as a "prefatory comment" before the specific questions on the death penalty. (8RT 288; see 8RT 292-293.)

The parties agreed to further discuss some of the death penalty questions, to see if they could reach an agreement on the proposed questions. (8RT 293-294.) The trial court stated it would take the revised questionnaire, including the comments based on the hearing that day, revise the court's questionnaire accordingly, and then give the parties another chance to review the amended questionnaire "and make further comments." (8RT 294-295.) On March 13, 2000, the trial court filed its proposed juror questionnaire. (10RCT 2304-2330.) Defense counsel submitted comments to the proposed juror questionnaire, including that questions 6 and 59 were "not needed" and 69 and 70 were "basically similar and splitting hairs." (10RCT 2331.)

There were further discussions regarding the juror questionnaire on March 20, 2000. The trial court stated it had gone through the prosecution's questionnaire and defense counsel's "suggestions" and had compiled a new questionnaire. (8RT 304-305.)

On March 23, 2000, there were further discussions on the latest questionnaire, going over individual questions, including whether the jurors belonged to pro or anti-abortion groups. Defense counsel had no objections to the abortion question (question no. 35). (8RT 310-313.) The trial court stated that it had removed question number 59, regarding general feelings about the death penalty, at defense counsel's request. Defense counsel

agreed. (8RT 316-317.) Defense counsel objected to question number 60, whether the juror's views on the death penalty had changed. (8RT 318-319.) Regarding question number 70, "What factors are important to you in determining life without the possibility of parole or death?" defense counsel objected that it should be "specific towards our case or not at all, as such." The trial court stated it had the "essential questions" at questions 63 through 67. "Everything else ... is not required, but may be helpful." (8RT 321.) While the prosecution argued that it wanted more questions regarding the death penalty, defense counsel stated, "I am willing to do away with this entire questionnaire, and it's not a flippant statement on my part." The prosecution opposed this suggestion. (8RT 322.) Defense counsel further stated, "the more I review these things, I am of the opinion that [appellant] would get just as fair a jury without going through these things. These questionnaires sometimes might make the case worse and prejudice the case rather than be helpful." The trial court only agreed to take out the question, "what does a sentence of life in prison without possibility of parole mean to you?" (8RT 323.) The trial court also stated it was "contemplating" giving the parties time to voir dire the jurors. (8RT 332.) Discussions continued on individual questions, including the court agreeing to delete question numbers 70 and 90, at the defense's request. (8RT 341-342.) After further discussions, the trial court stated it would give the jurors a "brief, neutral statement of the case" attached to the questionnaire. (8RT 346.)

A "redone" juror questionnaire was filed on March 24, 2000. (11RCT 2414-2431.)

On March 27, 2000, there was a further discussion on juror questionnaire issues. The trial court reiterated that it was considering allowing the parties to voir dire the jurors for a "certain amount of time" that the parties could use "however you want." (8RT 381-382.) The

parties would also be allowed to suggest follow-up questions to the court. (8RT 382.)

On March 29, 2000, defense counsel filed a request to require prospective jurors to answer additional questions. Defense counsel requested the following questions:

> Assume for the sake of this question only, that in the guilt phase, the prosecution has proven to be true one or more special circumstances beyond a reasonable doubt and you personally believe the special circumstance(s) to be true, would you vote for the death penalty if the victims were minor children, no matter what mitigating evidence was presented? Yes ___ or No ___.
>
> Assume for the sake of this question only, that in the guilt phase, the prosecution has proven to be true one or more special circumstances beyond a reasonable doubt and you personally believe the special circumstance(s) to be true, [d]o you understand that the law requires that the aggravating circumstances substantially outweigh the mitigating ones before considering applying the death penalty? Yes ___ No ___.
>
> Could you apply such a test even though the four victim's [*sic*] were all minors?
>
> Yes ___ No ___.
>
> If not, why not?

(11RCT 2528-2529.) Defense counsel argued that the prosecutor and he had agreed to these questions, but the trial court "took it upon itself" to incorporate the issue of the victims being minors "by putting it ... in a general fashion on p. 10 of the proposed questionnaire." Defense counsel argued that without these specifically directed questions, "the defense will be in the blind as to whether any juror could not fairly and impartially deal with an accused who may have caused the deaths of four (4) minors." (11RCT 2529.)

On April 11, 2000, the defense request for additional questions to be added to the juror questionnaire was heard and modifications to the questionnaire were made. (11RCT 2565; see also 10RT 547-552, 557.) Specifically, the trial court noted that on page 10 of the proposed questionnaire, it had in bold print the following language: "Also assume for the purposes of the following questions that the evidence may tend to show that the four victims were the children of the defendant and ranged in age from five to age 12." The trial court added that this language, coupled with question 67, "basically asks what Mr. Waco is suggesting in his two additional questions." (10RT 547-548.)

Defense counsel stated that if the court had a "problem" with his two suggested questions, then he requested that the language that the court had suggested on page 10 be added before question 67. The court had "no problem" with defense counsel's suggestion. (10RT 548.) Defense counsel stated, "I have no problem with" referring to the language in bold print on page 10, and he further stated "I am perfectly happy with that." (10RT 549.) Defense counsel again reiterated, "I am the one that agreed to say we can throw this whole questionnaire out...." (10RT 550.) The trial court ultimately declined to give defense counsel's proposed additional questions. (10RT 552.)

Jury selection commenced on April 24, 2000, with a prospective panel of 40 jurors. The trial court received requests for hardship disqualification. Those jurors not requesting hardship disqualification were given a questionnaire and asked to leave the courtroom to fill it out. (11RCT 2603-2654; 11RT 602-603, 605, 633-635.) Defense counsel agreed with this procedure. (11RT 632.)

Jury selection continued on April 25, 2000. The trial court asked counsel to submit follow-up questions to the 12 questionnaires from jurors it had received so far. (11RT 687-688.) The trial court indicated that juror

no. 12, who had initially wanted to be excused for hardship, was also opposed to the death penalty. It appeared to the court that prospective juror no. 12 should be excused for cause without any further inquiry. (11RT 688.) A second prospective panel of 50 jurors received hardship declarations or questionnaires. (11RT 696-699.) A third prospective panel of 50 jurors was sworn and received hardship declarations or questionnaires. (11RT 722-723.) The trial court asked follow-up questions suggested by the prosecution and the defense. (11RT 744-754.) Prospective juror no. 8209 stated, in response to follow-up questions suggested by defense counsel, that she would always vote for the death penalty if a person were found guilty of murder. (11RT 755-756.) Defense counsel challenged her for cause and she was excused. (11RT 756-757.)

On April 26, 2000, juror selection continued when a new panel was sworn and received hardship declarations or questionnaires. (11RT 764, 766-767.) Another panel of 57 prospective jurors was sworn and received hardship declarations and questionnaires. (11RT 793-796.) The trial court told counsel that it had a list of follow-up questions and it would consider the parties' requests for further follow-up. Additionally, the trial court would allow counsel to ask questions, "within reason." (11RT 812.) The parties would have two days to go through the questionnaires and prepare follow-up questions. (11RT 715, 812.)

Questioning of prospective jurors resumed on May 1, 2000. (12RT 820.) The trial court informed the prosecution that its two proposed follow-up questions regarding whether the jurors could impose the death penalty were not appropriate and the court would not ask the questions. However, where the juror gave "equivocal" answers, the court would allow some follow-up questions. (12RT 821-822.) The trial court informed defense counsel that some of his follow-up questions asked the jurors to "consider the facts in this case," which was inappropriate. (12RT 824.) Prospective

jurors were questioned about their views on the death penalty. Juror number 6519 was excused for cause, over a defense objection to ask follow-up questions, due to her "unequivocal response that she's adamantly opposed to the death penalty." (12RT 845-849.) Defense counsel asked the trial court to ask a follow-up question of juror no. 8595 regarding "particular types of heinous crimes he had in mind in answering question no. 60." The trial court asked the juror if he meant "anything in particular, particular types of murder?" The juror answered in the negative, and defense counsel had no further follow-up questions of him. (12RT 878.) The trial court also acquiesced to defense counsel's request for a follow-up question for juror no. 9202 regarding whether, despite the fact that the victims were young, she could still be fair and impartial to both sides. (12RT 879-880.)

Defense counsel was allowed to personally ask follow-up questions to juror no. 6707 regarding her attitudes towards doctors testifying that a person has a mental problem at the time of the crime. (12RT 888-889.) However, the trial court would not allow defense counsel to ask another question about where the juror got her view on doctors. The trial court would not permit the question because the juror had already answered that she got her views from watching the movies. (12RT 891; see also 895-896 [renewed request to question juror no. 6707].) Defense counsel was also not allowed to ask follow-up questions to juror no. 0300, because the trial court questioned him and "he's open to both penalties." Defense counsel wanted to ask about whether "he may have [a] problem with regards to what mitigation, if any, he would listen to ...." The trial court responded, "[w]e're not going to get into the evidence in this case." (12RT 892.) Defense counsel challenged this juror for cause, because he had reason to believe that this juror felt "strongly" about multiple homicides. (12RT 899.) Defense counsel challenged juror no. 6707 for cause, because she

had "amply demonstrated" that she was biased against doctors testifying that a person has a mental problem at the time of the crime. (12RT 897.) The trial court denied the challenge for cause to jurors no. 6707 and no. 0300. (12RT 900.) The trial court also denied a request by the prosecution to ask further follow-up questions. (12RT 900.) Defense counsel subsequently exercised peremptory challenges to both juror no. 6707 and juror no. 0300. (12RT 923, 966.)

Juror No. 9633 testified that he was unable to "condemn anybody to death" under any circumstances. (12RT 893.) Defense counsel wanted to ask this juror whether there were any types of crimes "sufficiently heinous" where he would consider the death penalty. (12RT 894.) The trial court granted the prosecution's challenge for cause as to this jurors, finding that "[i]t's clear to the court that this juror's views on capital punishment will prevent or substantially impair his ability to be neutral and follow the court's instructions and the law." (12RT 900.)

Voir dire continued and defense counsel was allowed to ask a follow-up question to juror no. 8595. The trial court warned, however, that "if I think it's covering the same territory, I'll interrupt you." Defense counsel then proceeded to ask juror no. 8595 if he understood "the differences in the rules with regards to the burden of proof in a civil case versus a criminal case?" The trial court interrupted, pointing out that the question "doesn't go to cause" and was "unnecessary." The trial court asked the parties to go back to chambers. (12RT 908.) The trial court then told defense counsel, "I can't trust you to ask a proper question at this point. So you're going to have to be specific so I can make a finding as to good cause why you should be allowed to ask any questions. [¶] Those are indoctrination-type questions. They have nothing to do with challenges for cause." (12RT 909.)

The trial court asked whether defense counsel had any further challenges for cause, but defense counsel stated that he could not say unless he was allowed to ask further questions. The trial court stated it would not allow any further questions unless they were in writing and the court thought they were "appropriate." The court did not allow any further questions and "the People will have their first peremptory." (12RT 911.)

As voir dire continued, defense counsel was allowed to ask extensive follow-up questions of juror no. 9217, a criminalist with the sheriff's department who knew a number of the witnesses. (12RT 923-937.) Defense counsel challenged this juror for cause, and the trial court granted the challenge. (12RT 938.) Defense counsel also requested follow-up questions for juror no. 2416, a civilian employee of the Burbank Police Department. The trial court asked the follow-up questions, and defense counsel had no further follow-up questions. (12RT 939, 942-945.)

The trial court would not allow defense counsel to ask follow-up questions of juror no. 7166, a senior detention officer with the Los Angeles Police Department. This juror had answered question number 60 with his belief that "the punishment should fit the crime." The court ruled, once again, that it would not allow questions that got into the facts of the instant case, and besides, "[t]he law is the punishment should fit the crime. That's the whole purpose of the death penalty law, isn't it?" (12RT 946-948.) Further, this juror answered that he would not automatically impose any sentence. (12RT 949.) However, the trial court did acquiesce to defense counsel's request for follow-up questions regarding juror no. 7166's training and experience with fingerprints. (12RT 951, 953.) Defense counsel exercised a peremptory on juror no. 7166. (12RT 954.)

Defense counsel was allowed to ask follow-up questions of juror no. 3801, a labor and delivery nurse who believed that a woman who got an abortion after 20 weeks gestation could be more prone to commit murder.

This juror was open to selecting either death or life without parole as a penalty for special-circumstances murder, based upon the evidence. (12RT 956-958.) She would "try" not to be prejudiced regarding penalty. (12RT 960.) She would wait until she heard all of the evidence before making her decision. (12RT 961.) Defense counsel challenged the juror for cause, but the challenge was denied. (12RT 962.) Defense counsel ultimately exercised a peremptory challenge against juror no. 3801. (13RT 1092.)

Defense counsel was allowed to ask follow-up questions of juror no. 8318, who had expressed "negative feelings" towards appellant because she was accused of murdering her children. (12RT 977-978.) After extensive questioning, in which the juror stated she would "try to be the fairest I could be," the trial court denied defense counsel's challenge for cause. (12RT 981-983.)

Defense counsel was allowed to ask follow-up questions of juror no. 0292, who expressed that she would not consider the death penalty under any circumstances. (12RT 988-990.) In response to defense counsel's question whether she could impose the death penalty "[i]f it's a heinous enough type" murder, she responded, "no." The trial court then granted the prosecution's challenge for cause. (12RT 991.)

Defense counsel was also allowed to ask follow-up questions of juror no. 2129, who "tend[ed] to be more in favor of the death penalty than not" and who thought a sentence of life in prison without parole was a "waste of resources." (12RT 994-996.) On follow-up questioning, this juror stated he would follow an instruction not to "consider the cost factor one way or other." (12RT 997.) Defense counsel was allowed to ask more follow-up questions. (12RT 997-1000.) Neither party challenged this juror for cause. (12RT 1002.)

Defense counsel was allowed to ask follow-up questions of juror no. 7591 questioning her ability to view photographs of the victims. The juror

clarified her response and defense counsel had no further questions. (12RT 1006.)

Defense counsel was allowed to ask follow-up questions of juror no. 0958. (12RT 1017, 1019.) Juror no. 0958 clarified that he did not believe that death was the only appropriate penalty for multiple murder. (12RT 1018.) He also clarified that some Latinos sometimes got on his nerves because they lived in this country but did not bother to learn the language. (12RT 1020.) Also, the Latinos he worked with in the post office were lazier than the Blacks and Asians he worked with. (12RT 1020-1021.) Neither party challenged this juror for cause. (12RT 1024.)

On May 2, 2000, questioning of potential jurors continued. The trial court granted defense counsel's challenge for cause to juror no. 6372, who stated unequivocally that if appellant were found guilty of killing four children, she should die. (13RT 1040.) The trial court asked juror no. 6964 follow-up questions, at the request of defense counsel. The follow-up questions were in regards to the juror's membership in a sheriff's association. (13RT 1047-1048.) Defense counsel challenged this juror for cause, but the challenge was denied. (13RT 1050.) Defense counsel exercised a peremptory challenge against juror no. 6964. (13RT 1052.)

The trial court granted a defense challenge for cause to juror no. 2214, who stated unequivocally that she would not vote for life with the possibility of parole for a person found guilty of special-circumstance murder. (13RT 1053.) Defense counsel asked follow-up questions of juror no. 0763, regarding her response that the death penalty was not given often enough. She also clarified her view that life without parole was a "severe punishment." (13RT 1069-1070.) She was not 'predisposed" towards a death sentence if appellant were convicted of murdering her four children. (13RT 1072.)

Defense counsel was also allowed to ask follow-up questions of juror no. 7483 concerning his attitudes towards abortion. (13RT 1077-1078.) Defense counsel was allowed to ask follow-up questions of juror no. 0066, who indicated that he would "go for" death more than life without parole. He clarified that it was his opinion that death was the only appropriate punishment for a person convicted of murdering four children. (13RT 1084-1085.) The trial court granted defense counsel's challenge for cause. (13RT 1085-1086.) The trial court allowed defense counsel to extensively question juror no. 1791, who had numerous medical issues and who expressed extreme reluctance to vote for the death penalty under any circumstances. The court ultimately excused her due to her medical problems alone, but also excused her for cause. (13RT 1093-1102.) A panel of 12 jurors and 4 alternate jurors were eventually sworn to try the cause. (18RCT 4392; 13RT 1104, 1225.)

B. Applicable Law

"*Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188 [101 S.Ct. 1629, 68 L.Ed.2d 22]; *People v. Bolden* (2002) 29 Cal.4th 515, 538.) A trial court conducting voir dire must "avoid two extremes":

> On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. [Citation.] In

> deciding where to strike the balance in a particular case, trial courts have considerable discretion.

(*People v. Cash* (2002) 28 Cal.4th 703, 721-722; see *People v. Coffman* (2004) 34 Cal.4th 1, 47; see also *People v. Burgener* (2003) 29 Cal.4th 833, 866 [a defendant has no right to ask "specific questions that invite[] prospective jurors to prejudge the penalty issue," or to educate the prospective jurors as to the facts of a case].)

A trial court "possesse[s] discretion to conduct oral voir dire as necessary and to allow attorney participation and questioning as appropriate." (*People v. Robinson* (2006) 37 Cal.4th 592, 614; *People v. Carter* (2005) 36 Cal.4th 1215, 1250 [manner of conducting voir dire not basis for reversal unless it makes resulting trial fundamentally unfair].)

The trial court "cannot bar questioning on any fact present in the case 'that could cause some jurors *invariably to vote for the death penalty*, regardless of the strength of the mitigating circumstances.' [Citation.] But the court's refusal to allow inquiry into such facts is improper only if it is 'categorical' [Citation] and denies *all* 'opportunity' to ascertain juror views about these facts. [Citation.]" (*People v. Carasi* (2008) 44 Cal.4th 1263, 1286-1287 [emphasis added in *Carasi*].)

This Court has "affirmed the principle that either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine penalty after considering aggravating and mitigating evidence." (*People v. Coffman, supra*, 34 Cal.4th at p. 47; see also *People v. Cash, supra*, 28 Cal.4th at pp. 720-721.)

A prospective juror may be excused for cause when his or her views on capital punishment would prevent or impair the performance of his or her duties as a juror. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105

S.Ct. 844, 83 L.Ed.2d 841]; *People v. Coffman, supra,* 34 Cal.4th at pp. 47-48.) A challenge for cause may be based on the prospective juror's response "when informed of facts or circumstances likely to be present in the case being tried." (*People v. Coffman, supra*, 34 Cal.4th at p. 47; *People v. Kirkpatrick* (1994) 7 Cal.4th 998, 1005.) This Court has explained that the "real question" is whether the prospective juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death, or conversely, life without the possibility of parole, "in the case before the juror." (*People v. Cash, supra,* 28 Cal.4th at pp. 720-721; see also *People v. Ochoa* (2001) 26 Cal.4th 398, 431.)

C. Appellant's Claim Regarding the Questionnaire Being Inadequate Is Forfeited; Moreover, on the Merits, the Trial Court's Voir Dire Was Constitutionally Adequate

Appellant contends that the trial court's inadequate voir dire deprived her of her rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (AOB 167.) Not so. It is settled that "[t]he Constitution . . . does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury." (*People v. Tafoya* (2007) 42 Cal.4th 147, 168 (internal quotations omitted).) "No hard-and-fast formula dictates the necessary depth or breadth of voir dire." (*Skilling v. United States* (2010) ___ U.S. ___, ___, 130 S.Ct. 2896, 2917.)

The trial court carefully devised a proposed questionnaire with input from both parties, and allowed the parties to ask follow-up questions in most instances. In this situation, reversal of the judgment is required only if the voir dire was "so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair." (*People v. Holt* (1997) 15 Cal.4th 619, 661.) Applying this standard, there is no basis for reversal here.

Appellant argues that the questionnaire was deficient (AOB 169), but this claim is forfeited on appeal based on the doctrine of invited error. The

doctrine of invited error is intended to prevent a defendant from successfully arguing error made by the trial court at his or her behest. If defense counsel intentionally caused the trial court to err, the defendant's claim will not be entertained on appeal. In order to successfully invoke the doctrine of invited error, it must be clear that counsel acted for tactical reasons and not out of ignorance or mistake. (*People v. Coffman, supra,* 34 Cal.4th at p. 49, citing *People v. Wickersham* (1982) 32 Cal.3d 307, 330.) To establish invited error,

> the record must show only that counsel made a conscious, deliberate tactical choice.... If counsel was ignorant of the choice, or mistakenly believed the court was not giving it to counsel, invited error will not be found. If, however, the record shows this conscious choice, it need not additionally show counsel correctly understood all the legal implications of the tactical choice. Error is invited if counsel made a conscious tactical choice. A claim that the tactical choice was uninformed or otherwise incompetent must, like any such claim, be treated as one of ineffective assistance of counsel.

(*People v. Cooper* (1991) 53 Cal.3d 771, 830-831.)

When an action is affirmatively taken, this Court has found a clearly implied tactical intent sufficient to invoke the invited error rule. In other words, there need not be a tactical purpose on the face of the record to bar a claim because an error was invited. (See *People v. Wader* (1993) 5 Cal.4th 610, 658.)

The doctrine of invited error is applicable in this case. Defense counsel stated on no less than three separate occasions that he was willing to do without any juror questionnaire. First, on March 2, 2000, defense counsel stated he had looked over the questionnaire and was willing to "take my chances without any questionnaire whatsoever." (7RT 250-251.) Defense counsel repeated this assertion on March 23, 2000, when he stated, "I am willing to do away with this entire questionnaire, and it's not a flippant statement on my part." (8RT 322.) Defense counsel made clear

that his statement was based on tactical reasons: "These questionnaires sometimes might make the case worse and prejudice the case rather than be helpful." (8RT 323.) Finally, on April 11, 2000, defense counsel reiterated, "I am the one that agreed to say we can throw this whole questionnaire out ...." (10RT 550.) Because defense counsel stated on no less than three separate occasions that he was willing to do without any questionnaire whatsoever, and he even supplied a tactical reason for his statements, any complaint now that the questionnaire was inadequate should be rejected under the invited error doctrine.

In addition to forfeiture based on the doctrine of invited error, appellant has forfeited this claim by failing to object to the questionnaire on the grounds that it was inadequate. Defense counsel submitted a proposed questionnaire and then an amendment to the proposed questionnaire. Defense counsel stated that he was asking the trial court to adopt the amended juror questionnaire as opposed to the original juror questionnaire that he had filed. He further stated that he was satisfied with the trial court's proposed juror questionnaire if supplemented with his amendments. (7RT 207-209.)

The proposed amendment to question 64 asked the jurors if they would be inclined to vote for the death penalty if there were four victims, no matter what the mitigating circumstances were. The proposed amendment to question 65 asked the jurors if they would vote for the death penalty if the victims were children, no matter what the mitigating circumstances were. As a follow-up to both questions, the jurors were asked what mitigating circumstances, if any, they would consider under such circumstances. (10RCT 2234.)

The trial court stated that it would include defense counsel's proposed amendments as a "prefatory comment" before the death penalty questions. (8RT 288.) The "prefatory comment" asked the jurors to assume, for

purposes of answering questions 64 through 70, pertaining to the application of capital punishment, that the evidence tended to show that the four victims were children of the defendant and ranged in age from five to 12. (11RCT 2426.) Defense counsel stated he was "perfectly happy" with this language. (10RT 549.)

Defense counsel did not thereafter object or request modifications to any of the remaining questions in the questionnaire on the basis that the questions were confusing, convoluted, compound, or otherwise inadequate. Accordingly, appellant has forfeited on appeal her current claim that the questions were not clear or were otherwise inadequate. (*People v. Robinson, supra*, 37 Cal.4th at p. 617; *People v. Avena* (1996) 13 Cal.4th 394, 413.)

In any event, on the merits, no basis for reversal appears. Appellant complains that the trial court did not ask questions based on the Judicial Council model questionnaire amended in 2004 and 2006. (AOB 169-170.) However, the voir dire here occurred in 2000, prior to the amendments, and the trial court stated that it was using questions that had been "tested and proven in reported decisions, and I feel comfortable sticking with the questions regarding the death penalty that I know are going to withstand any kind of challenge." (8RT 287.) Under these circumstances, appellant cannot show that the trial court abused its discretion.

Appellant argues that the trial court used convoluted language that was compound and confusing, especially in questions 64 through 67. (AOB 171-172.) She cites two cases for the proposition that compound questions interfere with the constitutional objectives of voir dire: *United States v. Littlejohn* (D.C. Cir. 2007) 489 F.3d 1335, 1346 and *Cabe v. Superior Court* (1998) 63 Cal.App.4th 732, 742. This Court need not reach the issue of whether compound questions interfere with constitutional rights, because the overwhelming majority of those jurors who appeared to

have problems understanding the questions were individually questioned by the court and counsel, and therefore any potential for confusion was ameliorated. Put differently, appellant's examples of juror confusion fail to support her argument.

Appellant points to prospective alternate juror no. 5013, as an example of a juror who stated that she did not understand question 67. (AOB 172, citing 18RCT 4378.) However, the trial court explained that question to her during oral voir dire for alternate jurors, and defense counsel had the opportunity to also ask her follow-up questions. (13RT 1143-1146, 1148.) Appellant also cited prospective jurors 1791, 2214, and 5090 as examples of jurors who were so confused by the questionnaire that they left several death qualification questions blank. (AOB 173.)

Juror no. 1791 gave some confusing answer on the questionnaire. As to question number 63, which asked if she belonged to any group that advocated abolition of the death penalty, she circled "no." The question then directed that if you answered "yes" to that question, then you were to proceed to answer questions (a) through (e). Juror no. 1791 left (a) through (d) blank, but then answered (e), on whether her views were based on religious considerations, by circling "Yes." The question then asked her to explain her "yes," but she left this section blank. (15RCT 3690.) On the following page of the questionnaire, which featured questions 64 and 65, juror no. 1791 failed to circle either "yes" or "no" to either question, as required, but then explained her answer to each question. As to question 64, she responded, "as a person who loves life, I can't understand how anyone could kill another person only if they were defending themselves or their loved ones. This is a hard question[.] I can't answer it." As to question 65, she answered, "I personally, if the defendant did these crimes, she certainly should pay for it. I would want to see if there were any

remorse. It would be difficult for me because I am Christian in my heart." (15RCT 3691.)

During oral voir dire, juror no. 1791 presented a note from her doctor regarding an ongoing ear problem. She had been sick the day before and appeared in "distress" the day she was questioned. (13RT 1093.) The trial court asked if any party wished to oppose her excusal based on illness. The prosecutor had no objection, but defense counsel asked for further questioning, if the court wished. The trial court then asked juror no. 1791 further questions about her illness and her attitudes towards the death penalty. Juror no. 1791 stated that she did not think she would be well enough to sit on the jury for two or three months. (13RT 1094.) During further questioning, juror no. 1791 stated that she would never vote to impose the death penalty under any circumstances. (13RT 1097-1098.) The trial court allowed defense counsel to question this juror further in an attempt to rehabilitate her. (13RT 1098-1100.) Juror no. 1791 continued to state that she could not sentence somebody to death under any circumstances. (13RT 1101.) The prosecution challenged this juror for cause, and the trial court excused her based on her medical problems, and for cause. (13RT 1102.)

Juror no. 2214 also left questions 60 through 66 blank. (14RCT 3317-3320.) She answered question 67, asking whether she would automatically vote for death, "yes" and explained, "children are children and shall not be murdered for any reason." (14RCT 3320.) During oral voir dire, this juror stated she could not look at photographs of the dead children and that she would not, under any circumstances, be open to the possibility of life with the possibility of parole for somebody that is guilty of murder in the first degree with one or more special circumstances found true. The trial court granted defense counsel's challenge for cause and excused this juror. (13RT 1052-1053.)

Juror no. 5090 also left unanswered question 60, and answered questions 66 and 67 "I don't know." (14RCT 3378, 3381.) During oral voir dire, this juror acknowledged that there were "a lot of questions I didn't really answer, and some I should have gone back to." (13RT 1060.) The trial court brought her back to questions 66 and 67, explained them to her, and got her responses. (13RT 1063-1065.) The parties stipulated that she be excused for cause. (13RT 1066.)

Juror no. 6322 also responded to questions 66, 67 and 68 with, "I don't know." (17RCT 4152.) However, this juror never made it into the box for oral voir dire, prior to the jury and alternate jurors being sworn in. Since this juror was never individually questioned, it would be sheer speculation to assume that the reason she did not know the answer to these questions was because the questions were written in a convoluted or confusing manner. And even if it were assumed this juror was confused, her confusion did not affect jury selection.

Juror no. 8821 likewise answered question 66 with the response "can't answer." (16RCT 3895.) During oral voir dire of this prospective alternate juror, the trial court went over her responses in the questionnaire and explained the concepts relating to the death penalty. (13RT 1176-1180.) Both parties asked follow-up questions of this juror. (13RT 1181-1185.) The prosecution challenged her for cause, which the trial court denied. The prosecution ultimately exercised a peremptory challenge and she was excused. (13RT 1186-1187.)

The trial court here had "'great latitude in deciding what questions should be asked on voir dire.'" (*People v. Earp* (1999) 20 Cal.4th 826, 852.) In those cases where the prospective jurors did not answer the questions on the questionnaire, the trial court went back over the questions in oral voir dire and explained the questions to the jurors. Then the parties were allowed to ask follow-up questions. In the present case, "[v]iewing

the voir dire record as a whole, we cannot say that the voir dire was inadequate and that the resulting trial was fundamentally unfair." (*People v. Stewart* (2004) 33 Cal.4th 425, 458.)

Appellant argues that the trial court erroneously prohibited "direct questions to prospective jurors that touched on the emotionally charged circumstances *specific to this case* ...." (AOB 174, emphasis added.) Appellant overlooks that the trial court may not conduct voir dire in a manner "so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented." (*People v. Cash, supra*, 28 Cal.4th at pp. 721-722.) On this issue, "trial courts have considerable discretion." (*Ibid.*)

Here, the trial court clearly informed the jurors on page 10 of the questionnaire that the evidence would tend to show that the four victims were appellant's children, ranging in age from five to twelve. (11RCT 2426.) Further, question 67 asked jurors to assume that appellant had been convicted of first degree murder and that one or more of the special circumstances was found to be true, and whether under those circumstances, the juror would automatically refuse to vote in favor of life without parole and automatically vote in favor of death, without considering any of the evidence in aggravation or mitigation. (11RCT 2428.) This question was sufficient to ferret out any potential bias in favor of death, including bias arising out of the revelation that the victims were four young children. The trial court did not abuse its considerable discretion in this instance.

Appellant further accuses the trial court of "[r]ushing the jury selection process" so that defense counsel was not allowed to ask follow-up questions of "many of the prospective jurors." (AOB 175-176.) Again, appellant is incorrect. As set forth above, the trial court either asked follow-up questions suggested by defense counsel, or allowed defense

counsel to ask follow-up questions himself, of many of the prospective jurors. (See 11RT 744-754, 755-756 [juror no. 8209]; 12RT 878 [juror no. 8595], 879-880 [juror no. 9202], 888-889 [juror no. 6707], 923-927 [juror no. 9217], 939, 942-945 [juror no. 2416], 951, 953 [juror no. 7166], 956-958 [juror no. 3801], 977-978 [juror no. 8318], 988-990 [juror no. 0292], 994-1000 [juror no. 2129], 1006 [juror no. 7591], 1017-1021 [juror no. 0958]; 13RT 1047-1048 [juror no. 6964], 1069-1070, 1072 [juror no. 0763], 1077-1078 [juror no. 7483], 1084-1085 [juror no. 0066], 1093-1102 [juror no. 1791]. The record amply refutes appellant's contention that the trial court "rushed" voir dire and prevented defense counsel from asking follow-up questions.

Appellant points to juror no. 7166 as an example of how the trial court's "rushed" process of voir dire "thwarted defense counsel's ability effectively to exercise challenges to biased jurors." (AOB 178-179.) This example does not support appellant's assertion. Juror no. 7166 was a senior detention officer with the Los Angeles Police Department. This juror had answered question number 60 with his belief that "the punishment should fit the crime." The court would not allow defense counsel to ask follow-up questions based on the specific facts of the instant case. Additionally, the trial court observed that "[t]he law is the punishment should fit the crime. That's the whole purpose of the death penalty law, isn't it?" (12RT 946-948.) Further, this juror answered that he would not automatically impose any sentence. (12RT 949.) However, the trial court did acquiesce to defense counsel's request for follow-up questions regarding juror no. 7166's training and experience with fingerprints. (12RT 951, 953.) This record amply refutes appellant's argument that the voir dire was "rushed." Defense counsel ultimately exercised a peremptory challenge on juror no. 7166. (12RT 954.)

Appellant also points to juror no. 6519 as another example of the trial court's rushed and hurried jury selection process. (AOB 179-180.) This juror answered question no. 60, describing her feelings on how the death penalty is used, as "too often." She explained, "I do not believe that anyone has the right to kill another." She responded to question 62(e), that her views on the death penalty were based on her religious convictions and "it is against the 5th commandment for man to kill man. Only God has the right to punish people for their sins." (14RCT 3357.) As to question 66, she responded that she would automatically refuse to vote for death and would automatically vote for life without the possibility of parole. She reiterated, "It is wrong for the state to play God." (14RCT 6519.)

When asked in question 69 whether she could set aside her beliefs and follow the law as the court explained it to her, she responded "no," and explained, "I do not believe that man's law has the right to put anyone to death." (14RCT 6519.) Juror no. 6519 was individually questioned by the trial court regarding her responses to the questionnaire, and based on her "unequivocal response that she's adamantly opposed to the death penalty," the trial court excused her for cause over a defense objection and request for more follow-up questions. (12RT 845-849.) Based on this record, the trial court's decision to excuse this juror was not rushed or hurried. The trial court did not abuse its discretion in finding that this juror gave "unequivocal response[s] that she's adamantly opposed to the death penalty" (12RT 847). (See *People v. Carpenter, supra,* 15 Cal.4th at p. 355 [trial court has discretion to refuse to allow defense counsel to question jurors for purpose of rehabilitation if their answers made their disqualification unmistakably clear].)

Appellant next contends that the trial court prevented adequate voir dire of prospective jurors 3801 and 8318. (AOB 181-183.) Again, the record shows that the trial court did allow defense counsel to ask follow-up

questions of both jurors. Juror no. 3801, a labor and delivery nurse, stated in response to the trial court's questioning that she believed that a woman who got an abortion after 20 weeks gestation could be more prone to commit murder, but she was open to selecting either death or life without parole as a penalty for special-circumstances murder, based upon the evidence. (12RT 956-958.)

Defense counsel then asked her if the nature of her job would " play a part in your feelings with regards to guilt, let alone the penalty?" She responded that she did not have any preconceived notions about the case and would "just go by the evidence." (12RT 959.) The trial court questioned juror no. 3801 further regarding whether she could select either death or life in prison without parole, and then defense counsel again followed-up by asking her if the nature of her work would cause her to feel prejudice. She responded that she would "try" not to be prejudiced regarding penalty. (12RT 960.) She would wait until she heard all of the evidence before making her decision. (12RT 961.) Defense counsel challenged the juror for cause, but the challenge was denied. (12RT 962.) Defense counsel then exercised a peremptory challenge against juror no. 3801. (13RT 1092.)

Defense counsel was also allowed to ask follow-up questions of juror no. 8318, who had expressed "negative feelings" towards appellant because she was accused of murdering her children. (12RT 977-978.) After extensive questioning, in which the juror stated she would "try to be the fairest I could be," the trial court denied defense counsel's challenge for cause. (12RT 981-984.)

Appellant contends that the jurors' response that they would "try" to be fair indicated bias and the trial court should have sustained the defense challenges for cause. (AOB 183, citing *United States v. Gonzalez* (9th Cir. 2000) 214 F.3d 1109, 1114 ["'Doubts regarding bias must be resolved

against the juror'"].) However, this Court has stated that when a prospective juror's responses to voir dire questions are halting, equivocal, or even conflicting, "'we defer to the trial court's evaluation of a prospective juror's state of mind, and such evaluation is binding on appellate courts.'" (*People v. Mendoza* (2000) 24 Cal.4th 130, 169; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 975 ["We accept as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous." (Internal quotations omitted)]. The trial court here was in the position to evaluate each of these jurors responses, and that evaluation is binding on the appellate courts. In sum, the trial court did not abuse its considerable discretion during voir dire.

Moreover, even assuming the trial court abused its discretion, there was no prejudice. In *People v. Bittaker* (1989) 48 Cal.3d 1046, 1086, the trial court imposed far more restrictions on voir dire than in this case, but this Court found that it should "limit reversals to those cases in which the erroneous ruling affected defendant's right to a fair and impartial jury." As in *Bittaker*, any error was harmless here. The trial court allowed defense counsel to ask follow-up questions in many instances, and those instances where the court did not allow follow-up questions were the exception. Moreover, defense counsel did not express dissatisfaction with the jury as sworn. "When the jury was finally selected, defendant did not claim that any juror was incompetent, or was not impartial. We therefore find no prejudicial error." (*People v. Bittaker, supra*, 48 Cal.3d at p. 1087; see also *People v. Avena, supra*, 13 Cal. 4th at p. 413; *People v. Pinholster* (1992) 1 Cal.4th 865, 916.)

DECLARATION OF SERVICE

Case Name: *People v. Sandi Dawn Nieves*
No.: **S092410**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 300 South Spring Street, Suite 1702, Los Angeles, CA 90013. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On February 25, 2011, I served the attached **Respondent's Brief (Volume 1 of 2)** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

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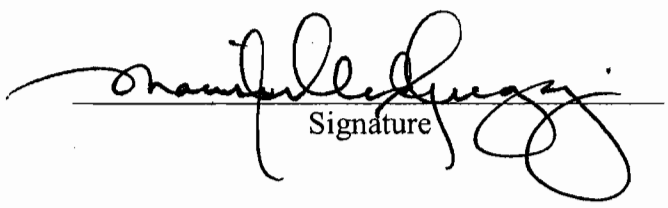
Hon. Ronald S. Coen, Judge

On February 25, 2011, I caused thirteen (13) copies of the **Respondent's Brief** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, California 94102-4797 by **Federal Express Overnight Service**.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 25, 2011, at Los Angeles, California.

M. O. Legaspi
Declarant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